STATEMENT OF JURISDICTION

The Texas Supreme Court issued its order denying Petitioner's motion for rehearing on October 21, 2005. App.6a. This Court has jurisdiction under 28 U.S.C. § 1257(a) and 28 U. S. C. § 2403(b) may apply. The Attorney General of Texas has beeen served and given notice.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *First Amendment* to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . . "

The *Fourteenth Amendment* provides that " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

Relevant statutory provisions of the *Texas Civil Practice and Remedies Code* are reproduced at App. 236a-262a.

STATEMENT OF THE CASE

For nearly ten years, this public official slander case has been in the state courts of Texas. The petitioner's comments made on a public access, call in programs, are the issue. The complaint is about seven programs, three in June of 1995 and four in early 1996. All the appeals have focused on "freedom of speech" and excessiveness of the damage award. Only one of the original eight defendants remains. Through the appeals process, the courts have reduced the jury's damage award of $8,295,000 to $1,300,000.

TEXAS SLANDER LAW: On January 20, 1840, the Fourth

Congress of the Republic of Texas passed an act establishing the "... Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) [178] shall, together with such acts be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress." (The relevant portion of the act is reproduced at App. 232a). This rule of decision is now found in *Texas Civil Practice & Remedies Code* § 5.001. App. 233a In 1985, the 69th Legislature of the State of Texas enacted a statute that established venue and a one-year statute of limitation for libel and slander cases. App. 234a. The 75th Texas Legislature in 1997 enacted a criminal slander statute in the Financial Code. That act criminalized "untrue and derogatory" statements about savings-and-loan associations. The punishment included a fine not to exceed $2,500, a maximum two years in prison or both. App. 235a.

TEXAS ACTUAL DAMAGE LAW: The common law controls actual damages for slander. Presumed damages are awarded for slander per se. See *Leyendecker & Assoc., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984); *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997) The Texas Legislature started to regulate exemplary damages by statute in 1987.

TEXAS EXEMPLARY DAMAGE LAW: The 70th Legislature in 1987 enacted a *Tort Reform Act*. App. 236a-248a. The act limits the award of exemplary damages. The limit "may not exceed four times the amount of actual damages or $200,000, whichever is greater."§41.007 App. 246a. A plaintiff could avoid the limitation on awards if he could prove "malice" or the cause was an "intentional tort." § 41.008 App. 246a. The act defined "malice" for this purpose as "conduct that is specifically intended by the defendant to cause substantial injury to the claimant." § 41.001(6)(A) App. 240a-241a.

In 1995, the 74th Legislature found it necessary to revise the exemplary damage statute. App. 249a - 262a. The Legislature

removed "as an example to others" from the meaning of "exemplary damages." Now, "'Exemplary Damages' means any damages awarded as a penalty or by way of punishment." §41.001(5) ~~App. 251a.~~ The revisions added a definition for "clear and convincing"§41.001(2) App. 250a., and changed the definition of "Malice." §41.001(7) App. 251a. Revised the limitations on recovery from two times the amount of actual damages to four times the amount of "economic damages" and with non-economic damages "not to exceed $750,000" or $200,000 which ever is greater." §41.008 App. 257a-258a. The revision eliminated the ability to avoid the limitation on awards. The act added: Statutory requirements to consider in making awards §41.010 ; the evidence that shall be considered relating to the amount of damages, § 41.011; jury instructions that the court must give the jury § 41.012. App. 259a-262a. The revision also requires that appellate courts to conduct a specific judicial review of the award and at the court's "opinion shall address the evidence for lack of evidence with specificity, as it relates to the liability for the amount of exemplary damages."§ 41.013. App. 262a. The revision was effective September 1, 1995. SECTION 2. App. 262a.

BACKGROUND This case is a slander suit for damages by a public official for slander by seven private individuals. The seven were amateurs who volunteered to cable cast, a public affairs, call-in talk show. The plaintiff, State District Judge Bascom W. Bentley III, filed suit on February 8, 1996, complaining of being called "corrupt" on several programs and a "criminal" once on a public access cable television program named "Questions and Answers" ("Q&A"). The program "Question and Answers" is a 90 minute, call in show which neither screens nor time delays its viewer's calls, which affords the host no opportunity to avoid or suppress the views of any person who chooses to publicly contradict the host's comments.

The Fourth Amended Petition and the video clips of

the "Q&A" programs include seven dates. Bentley alleged that slanderous remarks accrued on following the dates: App. 194a-206a.

1. June 6, 1995 Bunton on the television program Q&A discusses long pending probation violation case on Bentley's docket and the sheriff's failure to honor an arrest warrant. "Now, Judge Bentley you oughta clear your docket up. This makes you look bad. It makes the system look corrupt."

2. June 20, 1995 Bunton responds to Bentley's threat of a lawsuit and updates long pending probation violation on Bentley's docket

> "I stand by everything that I said that night and I'm going to give you more tonight about this issue . . . I offer Judge Bentley and [Sheriff] Mickey Hubert both the opportunity to come on this show and tell you that what I'm saying is just not true. . . . Judge Bentley's not the only corrupt public official in the Anderson County Courthouse. ... I think our whole justice system in this town, not everyone in it, but the overall system is corrupt. [Male caller] The higher Aeschylean is. [Bunton] Absolutely. Matter a fact to name the five most corrupt political officials at the county level in alphabetical order uh would be Bentley, Bournias, Calhoon, uh Herrington and Hubert, top five. The most corrupt public officials."

3. June 27, 1995 Bunton responds to Bentley's denial that he is not responsible for his docket and conducts a viewer call in survey "Is Judge Bentley corrupt?"

> "I would ask you to do is you can call in and give your position on the survey on whether Judge, you consider Judge Bentley corrupt ... Let's go back and talk about Judge Bentley and I am not gonna go back over this whole thing on his corruptness, my opinion but uh you'll have to make up your own opinion."

- September 1, 1995, the effective date of the revised "exemplary damage" statute. SECTION 2 App. 262a.

4. January 30, 1996, With upcoming primary elections Bunton discusses removal petitions, two funds in the district attorney's office, contributions to County Judge candidates, and unlawful imprisonment of Neal. Bunton listed Bentley the most corrupt elected official in the County, for the first time.

5. February 1, 1996, Bunton comments on removal petitions, contributions to the County Judge candidates and the long pending probation violation on Bentley's docket

6. February 6, 1996, Bunton reports that the district judges have come up with new rules on how to deal with criminal cases. The new rules includes the probation violation that's been on Bentley's docket for over two years. Also reported that Bentley violated the law in putting Neal back into the County Jail

PRETRIAL

- February 9, 1996, Bentley file suit against Bunton and others.

7. March 7, 1999, Bunton discusses: Bentley's deposition being postponed; discusses phone calls to the Bentley hot line; the discussion included a report of where the judge asked the

sheriff to have prisoners work on private property downtown.

Bentley named as defendants in his complaint Bunton (petitioner) and six other individuals who helped produce the program and the City of Palestine, the cable franchising authority. The City of Palestine filed for summary judgment. Shortly afterward Bentley non-suited the city. The trial judge granted the motion for non-suit on January 22, 1997. On January 31, 1997, Bentley filed his Fourth Amended Petition. App.194a-206a.

TRIAL

This case was tried before the Honorable Judge John Hill, presiding in the District Court of the Third Judicial District in Anderson County, Texas. On Feb. 10, 1997, a jury trial began with seven defendants Bunton, Gates, Ramsey, Moore, Munsinger, Faulkner and Virgadamo. At the conclusion of the plaintiff's case in chief, the court granted a directed verdict in favor of defendants Ramsey, Moore, Munsinger, Faulkner and Virgadamo. The trial continued with the remaining defendants Joe Ed Bunton and Jackie Gates.

At the conclusion of all the evidence, the court granted the plaintiff's motion for a partial directed verdict against Joe Ed Bunton for "defamatory per se." App. 209a-213a. At the end of all evidence the Judge issued the Charge of the Court. App. 214a-228a. Five of the eleven jury questions pertained to Bunton:

> Question 4 App. 219a-220a.
> Do you find from clear and convincing evidence that Joe Ed Bunton acted with actual malice in publishing any defamatory statement about Bascom Bentley?
>
> Question 5 App. 220a-221a.
> Did Joe Ed Bunton and Jackie Gates enter into

a civil conspiracy to publish defamatory statements about Bascom Bentley?

Question 6 App. 221a.
Do you find that Joe Ed Bunton, in publishing defamatory statements about Bascom Bentley, acted with malice?

Question 8 App. 222a-223a.
What sum of money, if paid now in cash, would fairly and reasonably compensate Bascom Bentley for mental anguish and the injury he suffered to his character and reputation both in the past and, in reasonable probability in the future, proximately caused by the publication of Joe Ed Bunton's defamatory statements?

Question 10 App. 225a.
What sum of money, if any, should be assessed against Joe Ed Bunton and awarded to Bascom Bentley as exemplary damages for the publication by Joe Ed Bunton of defamatory statements concerning Bascom Bentley?

The jury found for the plaintiff Bentley on all questions. The jury award against Bunton in actual damages was: past mental anguish $7,000,000; past damages to his reputation $100,000; and future damage to his reputation $50,000 and $1,000,000 in exemplary damages. Against Gates the jury awarded in actual damages for: past mental anguish $70,000; and past damages to his reputation $25,000 and $50,000 in exemplary damages

POST-TRIAL In the Final Judgment, "the court granted plaintiff's motion for a partial directed verdict and ruled as a matter of law that defendant Joe Ed Bunton had published

false and defamatory statements about plaintiff Bascom W. Bentley by accusing him of being corrupt and a criminal". Both defendants Bunton and Gates objected to the finding of falsity. The trial court denied the objections. The trial court denied joint and several liability for the actual damages. The trial court entered the judgment assessing the total sum against Bunton $ 9,560,410.40 and the total sum for Gates was $163,739.72. App. 229a-231a

The trial judge on September 30, 1997, granted Mr. Crider's motion to withdraw as counsel for Bunton. From that point Bunton became a Pro Se party. The trial court denied Bunton's post trial motions: Motion to Disregard Jury Finding; Motion to Modify Judgment; Motion for New Trial; and Nunc Pro Tunc. All parties appealed.

APPEALS

1. Twelfth Court of Appeals 1999 The appeals were heard by the Twelfth Court of Appeals before Justices Ramey, Hadden and Worthen. On October 22, 1999, Chief Justice Ramey delivered the opinion for the court in *Bunton v. Bentley*, No. 12-97-00376-CV, 1999.TX.0048575 (Tex.App. Dist.12 October 22, 1999) (VersusLaw). App. 166a-193a. The Court upheld verdict against Bunton. Denied Bentley's appeal for joint and several liability. Rendered judgment that Bentley take nothing on his cause of action against Gates. Court found that Gates had not made any defamatory statements about Bentley and that the trial court had erred in not granting Gates' motion for an instructed verdict.

2. Supreme Court of Texas 2002 Both Bentley and Bunton appealed to this court. Oral arguments presented in El Paso on February 21, 2001, to the eight-member court consisting of Chief Justice Phillips, Justices Hecht, Enoch, Owens, Baker, O'Neill and Hankinson.

On August 29, 2002, this court issued an opinion in, *Bentley*

v. Bunton, No. 00-0139, 2002.TX.0005488 (Tex. August 29, 2002) (VersusLaw). App. 24a-165a. "Justice Hecht delivered the opinion for the Court with respect to Parts I[background] III [opinion rather than fact] , IV [falsity], and V[actual malice] , in which Justice Owen, Justice Baker (except for Part V-D [Gates's actual malice]), Justice Jefferson, and Justice Rodriguez joined, with respect to Part II [Texas Constitution's speech protection], in which Chief Justice Phillips, Justice Enoch, Justice Owen, Justice Baker, Justice Hankinson, Justice Jefferson, and Justice Rodriguez joined, and with respect to Part VII [conclusion] , in which Chief Justice Phillips, Justice Enoch, Justice Owen, Justice Hankinson, Justice Jefferson, and Justice Rodriguez joined, and an opinion with respect to Part VI [damages], in which Justice Owen, Justice Jefferson, and Justice Rodriguez joined. Chief Justice Phillips filed an opinion concurring in part and dissenting in part, and concurring in the judgment, in which Justice Enoch and Justice Hankinson joined. Justice Baker filed a dissenting opinion. Justice O'Neill did not participate in the decision."

Justice Hecht wrote in part IV. App. 63a

> " The court of appeals erred in holding that the defendants were required to prove as an affirmative defense that the statements were true. We have not required proof of falsity to the more than preponderance of the evidence and neither has the United States Supreme Court. If the evidence is disputed, falsity must be determined by the finder of fact."

Chief Justice Phillips, joined by Justice Enoch and Justice Hankinson, concurring in part and dissenting in part. App. 117a.

> [272] Most, though not all, of the underlying facts Bunton used to support his accusations were accurate. It was only Bunton's

> conclusions that were faulty. To a layperson, it might well be plausible that dormant case dockets, individuals erroneously thrown back into jail after finishing their sentences, campaign contributions to candidates for judicial positions Bentley supervised, and appellate court reversals would suggest corruption. Bunton was also correct when he complained that Bentley did not order an audit despite receiving monthly reports revealing that a county official over whom he had supervisory authority had not deposited public funds as required by law, and that Bentley took no action after learning that a local sheriff had refused to exercise an arrest warrant.

On Bentley's appeal, this court ordered "The judgment of the Court of Appeals that Bascom W. Bentley, III take nothing from Jackie Gates is affirmed". "A divided supreme court determined that the evidence that Bunton acted with actual malice in defaming Bentley is clear and convincing. This court stated, as a matter of law, Bentley is entitled to recover actual damages for injury to his reputation and for mental anguish. It remanded the case" to the court below "to reconsider the excessiveness of the jury's award of mental anguish damages, a complaint found in Bunton's fourth issue." *Bentley v. Bunton*, No. 12-97-00376-CV, 1999.TX.0048575, ¶232-233 (Tex. August 29, 2002) (VersusLaw). App. 102a-103a.

Only four Justices advanced the reasons for the remand, "---would remand the case to the court of appeals to reconsider the excessiveness of the jury's award of mental anguish damages against Bunton in view of this opinion. It may be that Bentley's action against him must be retried, but the court of appeals is free to suggest a remittitur."

A motion for rehearing was filed by Bunton on October 17, 2002. This court denied the motion for rehearing on

February 13, 2003.

3. Twelfth Court of Appeals 2003 The Twelfth Court of Appeals, on August 7, 2003, issued an opinion on remand. Chief Justice Worthen issued the opinion for the court, *Bunton v. Bentley*, No. 12-97-00376-CV, 2003.TX.0006159 (Tex.App. Dist.12 August 7, 2003) (VersusLaw). App. 16a-23a. The panel consisted of Chief Justice Worthen, Justices Griffith and DeVasto. It was the judgment of the Court of Appeals that the trial court judgment was in error so far as the award of $7 million in mental anguish damages. The court suggested a remittitur in the amount of $6,850,000. Bentley timely filed the remittitur. The Court of Appeals below, on August 20, 2003, issued the judgment that reformed and, as reformed, affirmed that Bentley recover from Bunton the sum of $150,000 in mental anguish damages, $150,000 in damage to his character and reputation, $1 million in exemplary damages and prejudgment interest in the amount of $59,178.08. Bunton filed a motion for rehearing which the Court of Appeals below overruled on September 5, 2003.

4. Supreme Court of Texas 2004 On October 22, 2003, Bunton filed a timely Petition for Review to this court. On December 17, 2004, Chief Justice Jefferson, Justices Hecht, Owen, Brister, Wainwright, Smith, and Medina, issued a Per Curiam opinion, *Bunton v. Bentley*, No. 03-0974, 2004.TX.0009353 (Tex. December 17, 2004) (VersusLaw). App. 24a-165a. Justice O'Neill did not participate in the decision.

> The Supreme Court of Texas' opinion stated that: "we conclude that he [Bunton] is entitled to raise a claim that those damages [exemplary] are excessive in light of the court of appeals' reduction of the compensatory-damage award. This court affirmed the portion of the court of appeals' judgment dealing with compensatory damages, reverse the portion of the judgment

dealing with exemplary damages, and remand this case to the court of appeals for further proceedings consistent with this opinion."

5. Twelfth Court of Appeals 2005 On March 23, 2005, the Twelfth Court of Appeals, issued an opinion on remand. *Bunton v. Bentley*, No. 12-97-00376-CV, 2005.TX.0002152 (Tex.App. Dist.12, March 23, 2005) (VersusLaw). App. 1a-5a. The panel consisted of Worthen, C.J., Griffith, J. and DeVasto, D.. Chief Justice Wortham issued the opinion for the court. "Considering the above factors as instructed by the supreme court, we conclude the jury's award of one million dollars in exemplary damages is reasonable. We affirm the trial court's judgment as to its award of exemplary damages to be recovered by Bentley from Bunton." On April 8, 2005, Bunton the appellant filed a Motion for Rehearing. On April 18, 2005, the Motion for Rehearing was denied.

6. Supreme Court of Texas 2005 On June 6, 2005, Bunton filed a third petition for review with the Supreme Court of Texas cause number 05-0441. App. 263a 264a. It was 10 years from the date of the first Q&A program in Bentley's complaint. The court denied the petition on August 26, 2005. Bunton filed a timely motion for rehearing on September 13, 2005. App. 265a-268a. The court denied the motion on October 21, 2005 and issued it's Final Order to the Court of Appeals on October 25, 2005. App. 6a, 7a.

REASONS FOR GRANTING THE WRIT

The States' Highest Courts Are Divided On This Issue.

This court should resolve an important federal question. The Supreme Court of Texas' decision conflicts with the decisions of other states' courts of last resort. Whether state courts can resolve federal constitutional deficiencies by judicial action

(interpretation or jury charges) or is legislative action required? At issue is the conflicting decisions of the Supreme Court of Texas and the Supreme Court's of Alabama, Alaska, New Mexico, Utah and Pennsylvania. This case provides this court an opportunity to resolve this important First Amendment issue. The resolution will address the serious issues of judicial activism, a matter of separation of powers.

Common Law Slander in this Case Is Unconstitutional

The Supreme Court of Texas and the Texas Twelfth Court of Appeals did not address the unconstitutionality of common law slander in a public official defamation case. Both state courts focused on First Amendment protections found in this Court's opinions and side step the legislature.

The Texas Twelfth Court of Appeals *Bunton v. Bentley*, No. 12-97-00376-CV, 1999.TX.0048575, ¶21 (Tex.App. Dist.12 1999) (VersusLaw) App. 171a.

> [21] The First Amendment to the United States Constitution prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. *Carr v. Brasher*, 776 S.W.2d 567, 570-71 (Tex. 1989).

Bentley v. Bunton, No. 00-0139, 2002.TX.0005488 , ¶152 (Tex. August 29, 2002) (VersusLaw). App. 70a-71a.

> [152] In the seminal case of *New York Times Co. v. Sullivan*, *fn72 the United States Supreme Court held that to protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes

> unpleasantly sharp attacks on government and public officials,"

The Supreme Court of Texas defined slander in a nonpublic official case, *Randall's Food Markets v. Johnson*, No. 94-0055, 1995.TX.40027, ¶33, 50 (Tex. January 12, 1995) (VersusLaw)

> [33] ... Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse. *Diaz v. Rankin*, 777 S.W.2d 496, 498 (Tex. App.--Corpus Christi 1989, no writ); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 333 (Tex. App.--Dallas 1986, no writ). In suits brought by private individuals,*fn6 truth is an affirmative defense to slander. *Town of South Padre Island v. Jacobs*, 736 S.W.2d 134, 140 (Tex. App.--Corpus Christi 1986, writ denied).
>
> [50] *fn6 At this time, we need not and do not decide whether truth is an affirmative defense in slander cases brought by public officials or public figures. See *Casso v. Brand*, 776 S.W.2d 551, 555 n.3 (Tex. 1989).

In 1927, the Supreme Court of the United States in *Fiske v. Kansas*, 274 U.S. 380 (1927), the Court sustained a First Amendment type of claim in a state case. Four years later the Court ruled in *Stromberg v. California*, 283 U.S. 359 (1931) that a state law was voided on grounds of its interference with free speech. "State common law was also voided, the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press, and religion beyond those enjoyed under English common law." *Bridges v. California*, 314 U.S. 252, 263-68 (1941)

In a report by Congressional Research Service, titled Constitution of the United States of America-Analysis and

Interpretation 1992- list more State Acts Held Unconstitutional:
On page 2147, *Garrison v. Louisiana*, 379 U.S. 64 (1964).

> Criminal Defamation Statute is unconstitutional as applied to criticism of official conduct of public officials because it incorporates standards of malice and truthfulness at variance with *New York Times v. Sullivan*, 376 U.S. 254 (1964).

On page 2207, *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

> Pennsylvania statute incorporating the common law rule that defamatory statements are presumptively false violates the First Amendment as applied to a libel action brought by a private figure against a media defendant; instead, the plaintiff must bear the burden of establishing falsity.

Constitutional Standards Apply Equally for Civil or Criminal Defamation Law. "What we said of Alabama's civil libel law in *New York Times*, 376 U.S., at 282-283, applies equally to the Louisiana criminal libel rule" *Garrison v. Louisiana*, 379 U.S. 64, 1964.SCT.40626. ¶24 (U.S.1964)(VersusLaw)

No Power to Fix the Constitutional Violations

The Texas Courts do not have the power to fix the constitutional violation contained in the Texas common law slander law. Chief Justice Rehnquist in his book pointed out the power to "revise" laws was proposed and rejected. *THE SUPREME COURT* by William H. Rehnquist, Vintage Books, 2001, page 275.

> "During the Constitutional Convention in 1787 it was proposed that the Supreme Court be granted a power to "revise" laws passed by Congress, but the convention rejected this

> proposal. Justices have a great deal of authority, but it is not an authority to weave into the Constitution their own ideas of what is good and what is bad."

State Courts Cannot Fix Unconstitutional Public Official Defamation Laws:
The Supreme Courts of Utah, Alabama, Alaska, New Mexico and Pennsylvania have determined that they do not have the power to correct constitutional deficiencies by interpretation or jury instructions.

UTAH: The Utah Supreme Court in *In re I.M.L.*, 61 P.3d 1038, 2002.UT.0000473, ¶52 (Utah 11/15/2002) VersusLaw

> ". . . Rather, the interpretation must be based on the language used, and [we have] no power to rewrite the statute to conform to an intention not expressed.'" Assoc. Gen. Contrs. v. Bd. of Oil, Gas & Mining, 2001 UT 112, ¶ 30, 38 P.3d 291 (quoting Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994))"

ALABAMA: The Alambama Supreme Court in *Ivey v. State*, 821 So.2d 937, 2001.AL.0000532, ¶51 (Ala. July 06, 2001)(VversusLaw)

> "... we are not able to save the statute in question because in doing so we would be stepping over the line of interpretation and engaging in legislation."

NEW MEXICO: The Supreme Court of New Mexico in *State v. Powell*, 114 N.M. 395, 1992.NM.40162, ¶57, 58 (N.M.App. July 27, 1992) (VersusLaw)

> [57] Nevertheless, the State contends that any constitutional defect in the statute can be cured by simply requiring the trial court to

> instruct the jury on "actual malice" when the Constitution so requires. The State's position boils down to three arguments. The arguments are not persuasive.
>
> [58] First, the State argues that jury instructions are procedural, not substantive law, and therefore are fully within the judiciary's power. We disagree.

ALSAKA: The Supreme Court of Alaska in *Gottschalk v. State*, 575 P.2d 289, 1978.AK.24,¶50 (Ak. February 10, 1978.) (VersusLaw) " . . . [W]e are not able to save the statute in question because in doing so we would be stepping over the line of interpretation and engaging in legislation."

PENNSYLVANIA: The Supreme Court of Pennslyvania in *Commonwealth v. Armao*, 286 A.2d 626,1972.PA.40150, ¶36 (Pa. January 20, 1972.) (VersusLaw)

> "The Commonwealth urges us to in effect re-draft the criminal libel statutes in accordance with First Amendment requirements. To accede to this request would be to undertake a wholly inappropriate judicial activity amounting to judicial legislation."

This issue cannot be resolved without this Court's intervention. The states' highest court, for nearly thirty-two years, are divided. After 166 years, it appears that the Texas Legislature will continue to do nothing about this issue. This will continue, until a court declares the slander law unconstitutional as it pertains to public officials. The Texas courts do not have the power to revise the unconstitutional provisions. A court should not award damages under an unconstitutional slander law.

Texas "preponderance of the evidence" decision conflicts with U.S. courts of appeal and other states.

The Texas Supreme Court decided that a public official plaintiff has the burden to prove falsity by a preponderance of the evidence. *Bentley v. Bunton*, No. 00-0139, 2002.TX.0005488, ¶135 (Tex. August 29, 2002) (VersusLaw) App. 63a. This decision conflicts with the decision of United States Court of Appeals for the Second Circuit and the Supreme Court's of Alabama, Iowa, Nebraska, Connecticut, West Virginia and Maryland.[1] This conflict has existed for more than 16 years. Only this Court can resolve this important First Amendment issue.

The issue is: Whether a public official plaintiff has the burden to prove falsity by a preponderance of the evidence or clear and convincing evidence? Justice Hecht delivered the opinion for the Supreme Court of Texas. "We have not required proof of falsity to be by more than a preponderance of the evidence, *fn65 and neither has the United States Supreme Court. *fn66"[2]

In 2005, this opinion has been cited as a minority opinion in two authorities. *Sack on Defamation* and in an opinion of the United States Court of Appeals Second Circuit.

Judge Sack in his book wrote:

> A public-figure plaintiff or a public-official plaintiff may have the burden not only of

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[1] *DiBella v. Hopkins*, 403 F.3d 102, 2005.C02.0000381, ¶64(2d Cir. April 4, 2005) (VersusLaw)

[2] *Bentley v. Bunton*, No. 00 0139, 2002.TX.0005488, 135, 404, 405 (Tex. August 29, 2002) (VersusLaw):App. 63a, 153a

[404] *fn65 Turner, 38 S.W.3d at 117.

[405] *fn66 See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989)("There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. We express no view on this issue." (citations omitted)).

> pleading and proving falsity, but also of establishing it "with convincing clarity," although the Supreme Court has expressly not decided the issue, and there are contrary holdings on the question. 46
>
> *Footnote 46:* In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2, 16 Media L. Rep. (BNA) 1881 (1989), the Supreme Court noted, while itself expressing no view, that there was "some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence."

Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 3.4, at 3-14 & n.46 (3d ed. 2005)

The most detail authority on this issue is the United States Court of Appeals Second Circuit. Circuit Judge Cardamone delivered the opinion of the court in *DiBella v. Hopkins*, 403 F.3d 102, 2005.C02.0000381, ¶ 67, 70-71, 64-65 (2d Cir. April 4, 2005) (VersusLaw):

> We acknowledge that a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence. . . . ; *Bentley v. Bunton*, 94 S.W.3d 561, 586-87 (Tex. 2002) (same under Texas law) .. Moreover, the leading treatise on defamation states that clear and convincing evidence is the prevailing standard of proof for falsity. . . . [W]e hold the district court correctly charged the jury requiring it to find falsity by clear and convincing proof.

Judge Cardamone in his opinion shows why the clear and convincing standard is an important First Amendment issue:

> [64] . . . In fact, courts have found good reason to favor the higher standard of proof. In *Robertson v. McCloskey*, 666 F. Supp. 241 (D.D.C. 1987), for example, the district court held:
>
> [65] [A] clear and convincing standard of proof for falsity would resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively. Indeed, as a practical matter, public-figure plaintiffs already bear such a burden, for in order to prove actual malice they must, of necessity, show by clear and convincing evidence that the defendant knew the statement was false or acted in reckless disregard of its truth. Finally, [the standard] has more than merely a logical or symmetrical appeal. To instruct a jury that a plaintiff must prove falsity by a preponderance of evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error.

These authorities show that there is a real conflict between courts, the issue is ripe for resolution and it is an important First Amendment issue. Only this court can resolve the conflict. This case provides the court an excellent vehicle by which to resolve this important First Amendment issue.

Compensatory and Punitive Damages May Require Particular Scrutiny or Limitations:

This Court has not, addressed the question; Whether the amount of compensatory and punitive damages may require particular scrutiny or limitation under the First and Fourteenth

Amendment? This court has long known the ability of damage awards to abridge the freedom of speech. There remains in this case $300,000 in compensatory damages and $1,000,000 in punitive damages. Petitioner Bunton questioned the excessiveness of the awards in his appeals to the Supreme Court of Texas. This is an important First and Fourteenth Amendment issue because of the impact large damage awards have on public participation.

Judge Sack in his book *Sack on Defamation* highlights the impact of damages and this Court's involvement:

> § 1.9 Damages
>
> It is the danger that expense, in damage awards and defense costs, poses to freedom of expression that prompted the Supreme Court's overlay of constitutional principles on the law of defamation. Excessive awards, said the Court in *New York Times,* constitute "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law. [254]
>
> While *Gertz* limits the circumstance under which punitive awards may be made, the Court has not, as yet, approached the question whether the *amount* of punitive damages may require particular scrutiny or limitation under the First Amendment. It has examined, very gingerly, the more general question of the propriety of punitive damage awards under the Due Process[260] and Excessive Fines[261] clauses of the Constitution. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,*'" the Court held that the Eighth Amendment does not foreclose the award of punitive dam-ages. In *Pacific Mutual Life Insurance Company v.*

> *Haslip*,'" the Court held that "[a]s long as the discretion [of juries] is exercised within reasonable constraints, due process is satisfied.'[266] In *TXO Production Corp. v. Alliance Resources Corp.*,'" the Court reconfirmed that view, holding that no mechanical test based on the mathematical relationship between compensatory and punitive damages was possible. And in *BMW v. Gore*,'" the Court elaborated on due-process limitations in punitive awards. None of the cases involved libel, slander, or the First Amendment.[267]

Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems*, §1-9, 1-43 -1-44 (3d ed. 2005)

Punitive Damage Process Was Unlike Haslip

Unlike in Haslip, the jury in this case was not correctly advised as to the state law. The Texas Legislature passed a revisions to Chapter 41 of the *Tex. Civ. Prac. & Rem. Code*. The revisions went into effect on September 1, 1995. The effective date fell after the three June 1995 "Q&A" programs and before the four 1996 programs.

Unlike in Haslip, the Court of Appeals did not follow the state procedures to prevent excessive punitive damage awards. The Court of Appeals did not review the trial court's actions or conduct the required statutory judicial review.

> *Tex. Civ. Prac. & Rem. Code*, Sec. 41.013. JUDICIAL REVIEW OF AWARD. (a) Except as provided for in Subsection (b), an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or

> award. The written opinion shall address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of this chapter.

Petitioner Bunton in his motion for rehearing listed the issues that he wanted the court to review. The list is a summary of the procedural failures in the Texas Court of Appeals: App. 267a-268a.

(1.) The Court of Appeals failed to even attempt to conduct the statutory judicial review the award of exemplary damages required by Section 41.013 of the *Tex. Civ. Prac. & Rem. Code*. Other courts of appeal are conducting the judicial review of the award of exemplary damages as required by statute.

(2.) The Court of Appeals failed to determine the applicable version of the exemplary damage statute ,Chapter 41 to the *Tex. Civ. Prac. & Rem. Code*. .{SECTION 2. 1995 Tex. Sess. Law Serv. Ch. 19 (S.B. 25) (VERNON'S)}

(3.) Court of Appeals failed to review the instructions to the jury. The Court should have determined if the state law was correctly described as to the purpose for punitive damages and the limitations on jury discretion. (Section 41.012 JURY INSTRUCTIONS, *Tex. Civ. Prac. & Rem. Code, State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S.Ct. 1513,2003.SCT.0000067 (2003)(VersusLaw),

(a.) "Clear and convincing evidence" was not the standard of evidence for determining "malice" (Section 41.001.(7) Tex. Civ. Prac. & Rem. Code) in jury Question 6. The jury was wrongly instructed to base its answer on a preponderance of evidence

(b.) The purpose of "exemplary damage" in jury Question 10, wrongly included "as an example to others" App. 225a.

(c.) The factors to consider in awarding exemplary damages in jury Question 10, wrongly included "f. Compensation for inconvenience" and "g. the frequency of the wrong committed" and failed to include "the net worth of the defendant" as required in Section 41.011 .(6) *Tex. Civ. Prac. & Rem. Code*. App. 225a.

(4.) As a matter of law, the Court of Appeals erred in reviewing the third guidepost in *BMW v. Gore* and State Farm v. Campbell. The examples used are not comparable to this case.

The Twelfth Court of Appeals did not use one public official defamation case in its' comparison of punitive damages. The Court did not compare the damage award to any criminal penalty. The Texas Legislature has recently passed a criminal slander statute. Tex. Finance Code, Section 101. App .235a. The maximum fine under the criminal slander statute is $2500.[1] *Bunton v. Bentley*, No. 03-0974, 2004.TX.0009353 (Tex. December 17, 2004)(VersusLaw) App. 267a.

> [20] Regarding the third factor, a comparison of punitive damage awards imposed for similar conduct, we conclude the award in this case is in line with other defamation cases. See *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914 (Tex. App. -- Corpus Christi 1991, writ dism'd) (Plaintiff awarded $1,000,000.00 in exemplary damages for slander.); *Frank B. Hall v. Buck*, 678 S.W.2d 612 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (Plaintiff awarded $1,300,000.00 in exemplary damages for defamation.).

Unlike Haslip, Texas procedures and courts did not provide the same due process protection that this court reviewed in Alabama. This issue provides this Court a vehicle to address

the question; What is the relationship of U.S. Constitution's due process protections and the state's protections against excessive damage awards?

Deeply divided over the Finding of "Actual Malice"

The Texas Supreme Court in its' 2002 opinion was deeply divided over the finding of "actual malice". *Bentley v. Bunton*, No. 00-0139, 2002.TX.0005488,¶232, 233 (Tex. August 29, 2002) (VersusLaw) App. 102a - 103a. It is clear that the boundaries that define actual malice are unclear and confusing. If this court would review the actual malice findings in this case would provide this Court a vehicle to review the implementation of this court's recent defamation holdings in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 ,1989.SCT.43119 (U.S. June 22, 1989) (VersusLaw) and *Milkovich v. Lorain Journal Co. Et Al.*, 497 U.S. 1,1990.SCT.43229 (U.S. June 21, 1990)(VersusLaw).

SUMMARY

This case provides this Court a vehicle to address important freedom of speech and due process issues. Only this Court can resolve these issues:

1. Whether state courts can resolve federal constitutional deficiencies by judicial action (interpretation or jury charges) or is legislative action required?

2. Whether a public official plaintiff has the burden to prove falsity by a preponderance of the evidence or clear and convincing evidence?

3. Whether the amount of compensatory and punitive damages may require particular scrutiny or limitation under the First and Fourteenth Amendment?

4. Whether the actual malice finding is consistent with this Court's prior decision?

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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January 16, 2006

APPENDIX A. Texas Twelfth Court of Appeals Opinion 2005

Bunton v. Bentley, No. 12-97-00376-CV, 2005.TX.0002152 (Tex.App. Dist.12, March 23, 2005) (VersusLaw)

[1] IN THE COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT TYLER, TEXAS

[2] No. 12-97-00376-CV

[3] 2005.TX.0002152< http://www.versuslaw.com>

[4] March 23, 2005

[5] JOE ED BUNTON, APPELLANT
v.
BASCOM BENTLEY, III, APPELLEE

[6] APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF ANDERSON COUNTY, TEXAS.

[7] Panel consisted of Worthen, C.J., Griffith, J., and DeVasto, J.

[8] The opinion of the court wãs delivered by: James T. Worthen Chief Justice

[9] OPINION ON REMAND

[10] A jury found Joe Ed Bunton guilty of defamation against Judge Bascom Bentley, III for acts committed during a time period beginning almost ten years ago. On original submission in this court, we affirmed the judgment against Bunton. Bunton v. Bentley, 12-97-00376-CV, 1999 Tex. App. LEXIS 7947 (Tyler October 22, 1999). After review, a divided supreme court remanded the case to this court to reconsider the excessiveness of the jury's award of mental anguish damages. Bentley v. Bunton, 94 S.W.3d 561 (Tex. 2002). Upon remand to this court, we found that the amount of mental anguish damages awarded to Bentley was excessive and suggested a remittitur in the amount of $6,850,000.00. Bunton v. Bentley, 12-97-00376-CV, 2003 Tex. App. LEXIS 6835 (Tyler August 7, 2003). Bentley timely filed the remittitur. The supreme court again reviewed the case. It ruled that Bunton is entitled to raise a claim that the punitive damages are unconstitutionally excessive in light of the reduction of the compensatory damage award and remanded the case back to us for our review of the exemplary damage award. Bunton v. Bentley, 153 S.W.3d 50 (Tex. 2004). We affirm the trial court's judgment.

[11] Background

[12] The jury awarded a total of $7,150,000.00 to Bentley for compensatory damages for Bunton's acts of defamation. After remittitur, the award for actual damages stands at $300,000.000. The jury awarded Bentley $1,000,000.00 in exemplary damages.

[13] Applicable Law

[14] In order to avoid the imposition of grossly excessive or arbitrary exemplary damages, the United States Supreme Court requires courts reviewing exemplary damages to consider three factors "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed. 2d 585, 601 (2003). The reviewing court considers these factors to ensure that exemplary damages are "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." Id., 538 U.S. at 426, 123 S.Ct. at 1524. Each of these factors must be reviewed de novo to ensure that exemplary damages are not grossly disproportional to the gravity of the defendant's conduct. Bunton, 153 S.W.3d at 54.

[15] The most important of these factors is the degree of reprehensibility of the defendant's conduct. Campbell, 538 U.S. at 419, 123 S.Ct. at 1521. In determining reprehensibility, we consider whether the harm caused was physical as opposed to economic, the tortious conduct evinced a reckless disregard of the health or safety of others, the target of the conduct had financial vulnerability, the conduct involved repeated actions or was an isolated incident, and the harm was the result of intentional malice, trickery, deceit, or mere accident. Id.

[16] The United States Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the

punitive damages award." Campbell, 538 U.S.at 424, 123 S.Ct. at 1524. However, in its discussion of ratios, it cited its past approval, on two separate occasions, of a 4-to-1 ratio. Id., 538 U.S. at 425, 123 S.Ct. at 1524.

[17] Discussion

[18] This case involves defamatory comments about an elected official, made repeatedly in a public forum over a long period of time. Bunton accused Bentley of being corrupt and a criminal who ought to be in jail. By corrupt, Bunton meant dishonest, unethical, shady, and unscrupulous. Bunton's charges that Bentley was corrupt were false as a matter of law. Bentley, 94 S.W.3d at 590. Bunton also accused Bentley of engaging in judicial misconduct, making improper campaign contributions, and various other bad acts. The evidence that Bunton acted with actual malice in defaming Bentley was clear and convincing. Id. at 602. As host of a cable television show, Bunton was in a position to air his comments to the general public. As a local district judge, Bentley was in a position to be harmed by those comments. We conclude Bunton's repeated acts of defamation constitute such reprehensibility as to warrant the imposition of exemplary damages.

[19] Turning to the second factor, we consider the disparity between the actual harm suffered and the punitive damages awarded. Actual damages presently stand at $150,000.00 for damage to Bentley's character and reputation and $150,000.00 for mental anguish, for a total of $300,000.00 in actual damages. This is roughly a three and one-third to one ratio between punitive and compensatory damages, which is within the Supreme Court's accepted ratio. See Campbell, 538 U.S. at 425, 123 S.Ct. at 1524.

[20] Regarding the third factor, a comparison of punitive damage awards imposed for similar conduct, we conclude the award in this case is in line with other defamation cases. See Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914 (Tex. App. -- Corpus Christi 1991, writ dism'd) (Plaintiff awarded $1,000,000.00 in exemplary damages for slander.); Frank B. Hall v. Buck, 678 S.W.2d 612 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (Plaintiff awarded $1,300,000.00 in exemplary damages for defamation.).

[21] Conclusion

[22] Considering the above factors as instructed by the supreme court, we conclude the jury's award of one million dollars in exemplary damages is reasonable.

[23] We affirm the trial court's judgment as to its award of exemplary damages to be recovered by Bentley from Bunton.

[24] (PUBLISH)

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APPENDIX B. Supreme Court of Texas Order Denying Review 2005

THE SUPREME COURT OF TEXAS

Orders Pronounced October 21, 2005

ORDERS ON MOTIONS FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

05-0441 JOE ED BUNTON v. BASCOM W. BENTLEY III; from Anderson County; 12th district (12-97-00376-CV, ___ SW3d ___, 03-23-05)

(Justice O'Neill not sitting)

APPENDIX C. Supreme Court of Texas Final Order 2005

THE SUPREME COURT OF TEXAS

Texas Judiciary Online

http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=26153

Case Information: Case Number: 05-0441

Date Filed: 6/7/2005

Case Type: PETITION FOR REV

Style: JOE ED BUNTON

v.: BASCOM W. BENTLEY III

Case Events:

Date	Event Type
10/26/2005	Case stored in record room
10/25/2005	final order of Supreme Court sent to CA
10/21/2005	Motion for Rehearing - Disposed

APPENDIX D. Supreme Court of Texas Opinion 2004

Bunton v. Bentley, No. 03-0974, 2004.TX.0009353 (Tex. December 17, 2004)(VersusLaw)

[1] IN THE SUPREME COURT OF TEXAS

[2] No. 03-0974

[3] 2004.TX.0009353< http://www.versuslaw.com>

[4] December 17, 2004

[5] JOE ED BUNTON, PETITIONER,

v.

BASCOM W. BENTLEY III, RESPONDENT

[6] ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS

[7] Per curiam.

[8] JUSTICE O'NEILL did not participate in the decision.

[9] The primary issue in this case is whether the petitioner waived his right to complain that the exemplary damages awarded by the trial court were unconstitutionally excessive. Even though the petitioner did not complain about the exemplary damages until the court of appeals issued its judgment, we conclude that he did not waive that claim. In this case, the court of appeals' judgment reduced the trial court's award of compensatory damages but left the exemplary damages intact. After the reduction of compensatory damages, the court of appeals had an obligation to review whether the exemplary damages were "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003); see also Tatum v. Preston Carter Co., 702 S.W.2d 186, 187-88 (Tex. 1986).

[10] The petitioner's claim that the exemplary damages were excessive in light of the actual harm thus arose only after the court of appeals reduced the compensatory-damage award. Consequently, we conclude that the claim is not waived, and we remand this case to the court of appeals for reconsideration of the exemplary damages.

[11] This is the second time that this Court has considered this defamation case. The case arose in the 1990s, when Joe Ed Bunton, a public-access television host in

Palestine, Texas, repeatedly accused Bascom Bentley III, a local district judge, of being "corrupt" and a "criminal" who "oughta be in jail." Bunton also accused Bentley of engaging in judicial misconduct, making improper campaign contributions, and various other misdeeds. Bentley requested that Bunton cease making such allegations, but Bunton refused, stating on his program that he welcomed a defamation suit from Bentley because "the facts are with us and this is the truth, and therefore it is not slander." Bentley subsequently sued Bunton and his television co-host for defamation.

[12] At trial, the court directed a verdict that Bunton's allegations of corruption and criminality were defamatory per se, and the jury then found that Bunton had made those statements with actual malice. The trial court's judgment ordered Bunton to pay Bentley $150,000 for past and future loss of character and reputation, $7 million for past mental anguish, and $1 million in exemplary damages. After the court of appeals initially affirmed the judgment against Bunton, this Court remanded the case back to the court of appeals "to reconsider the excessiveness of the jury's award of mental anguish damages against Bunton." 94 S.W.3d 561, 607. On remand, the court of appeals concluded that "[a]n award of $7,000,000.00 in mental anguish damages is unsupported by the evidence and is so large as to be contrary to reason," and suggested a remittitur that would reduce the mental anguish damages to $150,000. ___S.W.3d___. The court of appeals did not adjust the exemplary damages because Bunton "did not complain on appeal of the award of exemplary damages." Id. at ___ n.1. Nevertheless, the court did note that "the ratio between the actual damage award, after remittitur, and the award for exemplary damages falls within the parameters set by the United States Supreme Court." Id. (citing Campbell, 538 U.S. at 424). In this Court, Bunton now challenges the awards

of both compensatory and exemplary damages.

[13] We first conclude that there is legally sufficient evidence to support the court of appeals' judgment with regard to the compensatory damages. When this case was before this Court for the first time, a four-judge plurality of the Court held that there was "no evidence that Bentley suffered mental anguish damages in the amount of $7 million," and remanded the case to the court of appeals to reconsider the mental anguish damages. 94 S.W.3d 561, 607-08. A majority of the Court agreed, however, that Bentley had provided legally sufficient evidence of some amount of mental anguish, stating that "[t]he record leaves no doubt that Bentley suffered mental anguish." Id. at 606; see also id. at 623-24(Baker, J., dissenting).A majority of the Court also agreed that "[t]he other amounts of actual damages found by the jury are well within a range that the evidence supports." Id. at 607; id. at 624 (Baker, J., dissenting). On remand, the court of appeals concluded that the$7 million mental anguish award was "unsupported by the evidence" and "so large as to be contrary to reason." ___S.W.3d___. The court determined that $150,000 would be "reasonable compensation" based on the evidence Bentley presented at trial, and suggested a $6,850,000 remittitur. Id.

[14] Consequently, the only compensatory-damages question before this Court is whether legally sufficient evidence supports a mental anguish award of $150,000. We conclude that it does. As we noted in our prior opinion, there was evidence that "the ordeal had cost [Bentley] time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and

distressed his children at school," and that "[f]riends testified that he had been depressed, that his honor and integrity had been impugned, that his family had suffered, too, adding to his own distress, and that he would never be the same." 94 S.W.3d 561, 606-07. We therefore hold that legally sufficient evidence supports the court of appeals' judgment as to the compensatory damages.

[15] Although the court of appeals suggested a significant remittitur of compensatory damages, it did not reevaluate the exemplary damages; instead, the court held that Bunton had waived any claim as to exemplary damages when he failed to "complain on appeal of the award of exemplary damages." ___S.W.3d___ n.1. We agree that, ordinarily, an appellant waives any complaint about the trial court's judgment that is not raised in the court of appeals. See Johnson v. Lynaugh, 796 S.W.2d 705, 707 (Tex. 1990); TEX. R. APP. P. 53.2(f) ("If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals."). A complaint that arises from the court of appeals' judgment itself, however, may be raised either in a motion for rehearing in the court of appeals or in a petition for review in this Court. See Larsen v. FDIC/Manager Fund, 835 S.W.2d 66, 74 n.12 (Tex. 1992); TEX. R. APP. P. 49.9. Under this standard, we conclude that Bunton's complaint that the exemplary damages were unconstitutionally excessive arose from the court of appeals' judgment and may therefore be raised in this Court for the first time.

[16] We have held that exemplary damages must be reasonably proportionate to compensatory damages, and that

adjustment of compensatory damages therefore requires reevaluation of the factors supporting an award of exemplary damages. See Tatum v. Preston Carter Co., 702 S.W.2d 186, 188 (Tex. 1986). Exemplary damages should not be adjusted by a mathematical formula; instead, each of the factors supporting the exemplary damages should be reevaluated in light of the actual harm suffered by the plaintiff. See id.

[17] The United States Constitution similarly requires an analysis of the relationship between the actual harm suffered and the exemplary damages awarded. Campbell, 538 U.S. at 416-18. This requirement is based on the Due Process Clause of the Fourteenth Amendment, which "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." Id. In order to avoid the imposition of grossly excessive or arbitrary exemplary damages, the United States Supreme Court requires courts reviewing exemplary damages to consider three factors: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id. at 418 (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996)). Each of these factors must be reviewed de novo to ensure that exemplary damages are not "grossly disproportional" to the gravity of the defendant's conduct. Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 434-36 (2001).

[18] All three factors work together to ensure that exemplary damages are "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages

recovered." See Campbell, 538 U.S. at 426. These factors are intertwined with each other and cannot be viewed in isolation; specifically, a reviewing court cannot conclude that a particular ratio is consistent with due process requirements unless that court examines the ratio in light of the other factors and in light of the actual harm to the plaintiff. Id. at 425-26 (noting that the Constitution's "due process guarantee" requires the reviewing court to consider the egregiousness of the defendant's act, the actual harm to the plaintiff, and the amount of compensatory damages awarded in determining whether the ratio is appropriate). Consequently, while the court of appeals correctly noted that the 3:1 damage ratio in this case is in line with ratios upheld by the Supreme Court, the analysis cannot end there. Instead, the "principles set forth in Gore must be implemented with care, to ensure both reasonableness and proportionality," and the analysis must be done "in light of the . . . compensatory damages awarded." Id. at 428-29.

[19] Because the exemplary damages must bear a reasonable relation to the defendant's conduct and to the actual harm suffered, a claim that the exemplary damages are grossly disproportionate may therefore arise any time the compensatory damages are significantly adjusted. Ideally, the court of appeals should automatically reevaluate exemplary damages whenever compensatory damages are reduced. See Preston Carter Co., 702 S.W.2d at 187-88. In this case, the court of appeals reduced the mental anguish damages from $7 million to $150,000. Even though Bunton did not initially appeal the award of exemplary damages, we conclude that he is entitled to raise a claim that those damages are excessive in light of the court of appeals' reduction of the compensatory-damage award. We therefore affirm the portion of the court of appeals' judgment dealing with compensatory

damages, reverse the portion of the judgment dealing with exemplary damages, and remand this case to the court of appeals for further proceedings consistent with this opinion.

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APPENDIX E. Texas Twelfth Court of Appeals Opinion 2003

Bunton v. Bentley, No. 12-97-00376-CV, 2003.TX.0006159 (Tex.App. Dist.12 August 7, 2003) (VersusLaw)

[1] IN THE COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT TYLER, TEXAS

[2] NO. 12-97-00376-CV

[3] 2003.TX.0006159< http://www.versuslaw.com>

[4] August 7, 2003

[5] JOE ED BUNTON, APPELLANT

v.

BASCOM W. BENTLEY, III, APPELLEE

[6] APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF ANDERSON COUNTY, TEXAS

[7] Panel consisted of Worthen, C.J., Griffith, J. and DeVasto, D.

[8] The opinion of the court was delivered by: James T. Worthen Chief Justice

[9] OPINION ON REMAND

[10] Bascom Bentley, III, a district judge in Anderson and Cherokee Counties, sued Joe Ed Bunton and Jackie Gates for defamation. The jury found in favor of Bentley. Against Bunton, the jury assessed $150,000.00 in damages to Bentley's character and reputation, $7,000,000.00 in past mental anguish, and $1,000,000.00 in exemplary damages. Against Gates, the jury assessed $95,000.00 in actual damages and $50,000.00 in exemplary damages. On original submission, we affirmed the judgment against Bunton but rendered a take-nothing judgment in favor of Gates. Bunton v. Bentley, 12-97-00376-CV, 1999 Tex. App. LEXIS 7947 (Tyler October 22, 1999). Upon review, a divided supreme court agreed that the trial court judgment against Gates cannot stand. The supreme court determined that the evidence that Bunton acted with actual malice in defaming Bentley is clear and convincing. That court stated, as a matter of law, Bentley is entitled to recover actual damages for injury to his reputation and for mental anguish. It remanded the case to this court to reconsider the excessiveness of the jury's award of mental anguish damages, a complaint found in Bunton's fourth issue.

Bentley v. Bunton, 94 S.W.3d 561 (Tex. 2002).

[11] Applicable Law

[12] We review the sufficiency of the evidence supporting an award of damages by the same standards as any factual question. Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986). The duty of this Court is to examine all the evidence and determine if the value found by the jury is so against the evidence, or unsupported by evidence, so as to be manifestly unjust. Id. The amount to be awarded as damages in a slander case rests largely in the discretion of the jury. Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 527 (Tex. App.-San Antonio 1996, writ denied) (op. on reh'g). When the slander is about the professional dealings of the plaintiff, and thus is slander per se, no independent proof of damage to the plaintiff's reputation or of mental anguish is required, as the slander itself gives rise to a presumption of these damages. Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 374 (Tex. 1984) (op. on reh'g). The damages resulting from slander are purely personal and cannot be measured by any fixed standard or rule. Town of South Padre Island v. Jacobs, 736 S.W.2d 134, 142 (Tex. App.-Corpus Christi 1986, writ denied). However, a jury may not ignore undisputed facts and arbitrarily fix an amount of damages which is neither fair nor just. Vanderlinden v. United Servs. Auto. Ass'n Property & Cas. Ins. Co., 885 S.W.2d 239, 242 (Tex. App.-Texarkana 1994, writ denied). There must be some evidence to justify the amount awarded. Saenz v. Fidelity & Guaranty Ins. Underwriters, 925 S.W.2d 607, 614 (Tex. 1996). There must be evidence that the amount found is fair and reasonable compensation. Id.

[13] Evidence

[14] Bentley explained how Bunton's actions hurt and disrupted his life and family. During the time period Bunton aired his public attacks against Bentley, there was a cloud over Bentley's home. He was unable to tend to his family obligations because he was sulking and worrying. He testified that Bunton's actions affected his family's ability to enjoy each other. However, he also agreed that there had been no disruption in his ability to perform as a judge, teach at a community college, or participate in community organizations and social activities. Bentley also testified that he incurred no medical, psychiatric, psychological, therapeutic, or counseling expenses as a result of Bunton's slander.

[15] Carol Bentley, Judge Bentley's wife, described the situation created by the defendants' slander as stressful and a "tragedy." She testified that it had ruined her husband's life and her children's lives. She explained that other kids laughed and joked about it to their children. She stated that her husband did not sleep. She testified that Bunton's slander took away Bentley's honor and integrity. She said his life will never be the same. One friend of Bentley's, Elton Bomer, testified that this case has made Bentley downcast, sad, and depressed. Another friend, Cliff Johnson, stated that the slander had a severe effect on Bentley and his family.

[16] Discussion

[17] Because this is a case of slander per se, we begin with a presumption of actual damages. See Leyendecker & Assocs., Inc., 683 S.W.2d at 374. However, the jury's award must find support in the evidence. See Pope, 711 S.W.2d at 624. While we are aware that the determination of damages lies within the jury's discretion, this record shows the jury's damage award is arbitrary, contrary to reason, and excessive. Although Carol Bentley testified that this episode has "ruined" her husband's life, Bentley himself testified there had been no disruption in his ability to perform as a judge, to teach, or to participate in community organizations and social activities. He has not been asked to step down from the bench. He did not lose his teaching job and neither his professional colleagues nor his personal friends have ceased to associate with him as a result of Bunton's slander. This evidence rebuts, at least in part, the presumption of injury to his reputation. See Swate v. Schiffers, 975 S.W.2d 70, 74 (Tex. App.-San Antonio 1998, writ denied).

[18] The record shows that, primarily, Bentley's home life, rather than his professional life, was injuriously affected. The evidence shows some mental suffering. Although Bentley sulked and worried, was upset because his children were embarrassed, and was even sad and depressed, his mental suffering never rose to a level requiring the attention of a professional to help him cope with it. There is no evidence that Bentley suffered an economic loss tied to his mental anguish. We acknowledge that Bunton's actions created a very unpleasant time for Bentley and his family. However, the jury did not accurately assess Bentley's actual damages in this case. An award of $7,000,000.00 in mental anguish damages is unsupported by the evidence and is so large as to be contrary to reason. We sustain Bunton's fourth issue to the extent he

complains of the excessiveness of mental anguish damages. *fn1

[19] Conclusion

[20] We may suggest a remittitur, in lieu of ordering a new trial, if we find the verdict to be excessive. Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, 960 S.W.2d 41, 51 (Tex. 1998). We need not find passion, prejudice, or other improper motive on the jury's part. Pope, 711 S.W.2d at 624. If we determine that the award is excessive, we then must exercise our sound judicial judgment and discretion to determine what reasonable compensation should be. Id. at 623. We conclude that the amount of mental anguish damages awarded to Bentley is excessive in the amount of $6,850,000.00. We suggest Bentley remit that amount within fifteen days. See Tex. R. App. P. 46.3; 46.5.

[21] If within fifteen days after this court's opinion, Bentley files in this court a remittitur of $6,850,000.00 of the mental anguish damages awarded in the trial court's judgment, then the trial court's judgment will be reformed and affirmed as to $150,000.00 in mental anguish damages. If the suggested remittitur is not timely filed, the part of the trial court's judgment applicable to Bunton will be reversed and the cause remanded to the trial court for new trial. See Tex. R. App. P. 46.3.

[22] (PUBLISH)

[23] ORDER

[24] THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being inspected, it is the opinion of this Court that there was error in the judgment of the trial court below insofar as the award of $7,000,000.00 in mental anguish damages to Appellee Bascom W. Bentley, III was excessive, and that in order to obtain an affirmance of said judgment, Appellee Bascom W. Bentley, III must file a remittitur in the amount of $6,850,000.00 within 15 days from the date of this order; otherwise, the judgment of the court below will be reversed and the cause will be remanded for a new trial.

[25] James T. Worthen, Chief Justice.

Opinion Footnotes

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[26] *fn1 Based upon the record before us, we are unable to reassess exemplary damages. See Bentley, 94 S.W.3d at 607. As we pointed out in our original opinion, Bunton did not complain on appeal of the award of exemplary damages. Bunton, 1999 Tex. App. LEXIS 7947 at *36. Therefore, we shall not address the sufficiency of the evidence to support the award. See Garcia v. Robinson, 817 S.W.2d 59, 60 (Tex. 1991) (Court of appeals should not reach issue not raised in the trial court or briefed on appeal.). Additionally, we note that the ratio between the actual damage award, after remittitur, and the award for exemplary damages falls within the parameters set by the United States Supreme Court. See State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003) (Holding that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.).

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APPENDIX F. Supreme Court of Texas Opinion 2002

Bentley v. Bunton, 94 S.W.3d 561, 2002.TX.0005488 (Tex. August 29, 2002) (VersusLaw)

[1] Texas Supreme Court

[2] No. 00-0139

[3] 94 S.W.3d 561, 2002.TX.0005488 <http://www.versuslaw.com>, 45 Tex. Sup. Ct. J. 1172

[4] August 29, 2002

[5] BASCOM W. BENTLEY, III, PETITIONER

v.

JOE ED BUNTON AND JACKIE GATES, RESPONDENTS

[6] On Petitions for Review from the Court of Appeals for the Twelfth District of Texas

[7] The opinion of the court was delivered by: Nathan L. Hecht Justice

[8] Argued on February 21, 2001

[9] Justice Hecht delivered the opinion for the Court with respect to Parts I, III, IV, and V, in which Justice Owen, Justice Baker (except for Part V-D), Justice Jefferson, and Justice Rodriguez joined, with respect to Part II, in which Chief Justice Phillips, Justice Enoch, Justice Owen, Justice Baker, Justice Hankinson, Justice Jefferson, and Justice Rodriguez joined, and with respect to Part VII, in which Chief Justice Phillips, Justice Enoch, Justice Owen, Justice Hankinson, Justice Jefferson, and Justice Rodriguez joined, and an opinion with respect to PartVI, in which Justice Owen, Justice Jefferson, and Justice Rodriguez joined.

[10] Chief Justice Phillips filed an opinion concurring in part and dissenting in part, and concurring in the judgment, in which Justice Enoch and Justice Hankinson joined.

[11] Justice Baker filed a dissenting opinion.

[12] Justice O'Neill did not participate in the decision.

[13] For months, the host of a call-in talk show televised on a public-access channel in a small community repeatedly accused a local district judge of being corrupt. A co-host on some of the shows expressed agreement with the accusations but never himself used the word "corrupt". The judge sued both of them for defamation. Based on conclusive proof that the accusations were false and defamatory, and on jury findings that the defendants acted with actual malice as well as a specific intent to cause injury, the trial court rendered judgment awarding the plaintiff actual and punitive damages assessed by the jury against each defendant separately. Notwithstanding the jury's finding that the defendants conspired together, the court refused to hold them jointly liable for the actual damages each caused. The plaintiff and both defendants appealed. The court of appeals affirmed the judgment against the talk show host who made the repeated accusations and reversed the judgment against his co-host. *fn1 The liable defendant and the plaintiff seek review here.

[14] The legal and evidentiary issues raised by the parties are too numerous and varied to summarize at this point, but principal among them are these:

[15] · Does article I, section 8 of the Texas Constitution restrict liability for defamation of a public official more than the First Amendment to the United States Constitution?

[16] · Under the circumstances presented here, are

accusations that a public official is corrupt actionable statements of fact or protected expressions of opinion?

[17] · Can a person be liable for defamation if all he does is express agreement with another's defamatory statements?

[18] · Were the accusations of corruption in this case false as a matter of law?

[19] · Can a person who falsely accuses a public official of being corrupt be proved by clear and convincing evidence to have acted with actual malice despite his assertions that he sincerely believed the accusations?

[20] · Under the circumstances, are awards of $7 million for mental anguish damages and $1 million punitive damages excessive as a matter of law either under Texas common law or the First Amendment?

[21] We agree with the court of appeals that only the one defendant is liable for defamation, but we conclude that the jury's finding of $7 million in mental anguish damages has no evidentiary support and is excessive as a matter of law by constitutional standards. We remand the case to the court of appeals for further proceedings.

[22] I.

[23] "Q&A;, a live, ninety-minute, call-in television talk show, began broadcasting weekly in 1990 on a public-access channel available to cable subscribers in and between Palestine and nearby Elkhart, two towns in Anderson County in East Texas. At that time, the population of Palestine, the county seat, was about 18,000, and the population of Elkhart was just over 1,100. *fn2 All of the participants in "Q&A; -including the self-described hosts, producer, director, investigators, reporters, and cameraman - were unpaid volunteers. The privately produced programs generally consisted of one or two hosts talking about various subjects of local interest, either by themselves or with guests or callers. Programs were often rerun during the week. Program content ranged from informational to editorial.

[24] Defendant Joe Ed Bunton, a Palestine native, helped start "Q&A;. Bunton had returned to Palestine several years earlier after college and fifteen years in the army, and had been elected to one term on the city council. He was defeated in his bid for re-election, as well as in three successive attempts to regain a seat on the council. After his first defeat, he became interested in public-access television as a means of increasing his involvement in grass-roots politics. Bunton began hosting "Q&A; programs in 1994. In his brief in this Court, Bunton describes "Q&A; as "a wide-open, sometimes caustic and/or an uncivilized public forum, which has become the electronic soapbox for Palestine, Texas."

[25] In the spring of 1995, Bunton learned of a criminal case that had been pending for two years in the 369th District Court before Judge Bascom Bentley III, one of four judges whose districts included Anderson County. Bentley, himself a lifelong resident of the county, had been appointed to the district court in 1989, elected in 1990, and re-elected in 1994. He had previously served as Palestine city attorney, county attorney, and judge of the county court at law. The defendant in the case, a young man named Curbo, had been charged with robbery (purse-snatching), and in March 1993, Judge Bentley had placed him on what the Texas Code of Criminal Procedure calls "community supervision" - a kind of probation - for five years with his adjudication of guilt deferred. *fn3 Barely eight weeks later, Curbo had been arrested for credit card abuse. *fn4 Court records reflected that in June 1993 the district attorney filed a motion to adjudicate Curbo's guilt on the robbery charge and that Judge Bentley released Curbo on his personal recognizance - that is, without a surety bond *fn5 - without ruling on the motion. From these records, Bunton surmised, without discussing the case with Curbo's lawyer or the district attorney, that Bentley's release of Curbo was improper, and furthermore, that Bentley had left the motion pending for criminal design: so that he could use the threat of further proceedings against Curbo to pressure Curbo's father, then a mayoral candidate, into acting as directed in the event he became mayor. Bentley, Bunton supposed, could control Curbo's father by threatening to adjudicate Curbo and sentence him to prison. Had Bentley been so motivated, his conduct would undisputedly have been criminal. *fn6 In fact, however, Curbo's release without a surety bond had been requested by Curbo's lawyer without objection from the district attorney and was clearly within Bentley's discretion, *fn7 and the case had remained pending because neither Curbo's probation officer nor the district attorney believed that Curbo, who suffered from learning disabilities, should be incarcerated. Accordingly,

neither Curbo's lawyer nor the district attorney had ever requested a ruling on the motion to adjudicate. Moreover, Curbo's father was not elected mayor.

[26] Bunton also learned early in 1995 that Anderson County Sheriff Mickey Hubert had refused to arrest one of his own deputies, Danny Harding, on a warrant that an assistant district attorney had helped procure without the approval of the district attorney, who had determined that evidence concerning Harding should first be presented to the grand jury. After what Bunton called an "investigation" of the circumstances, he concluded that Hubert had violated article 2.18 of the Texas Code of Criminal Procedure ("Custody of Prisoners") *fn8 and section 39.02(a)(1) of the Texas Penal Code ("Abuse of Official Capacity"), *fn9 even though the district attorney had had the warrant recalled. Bunton also concluded that Bentley, who had not issued the warrant and was in no way involved in the matter, was responsible for failing to convene a court of inquiry to determine whether Hubert had violated the law *fn10 and to have him arrested. *fn11

[27] On the "Q&A; program broadcast on June 6, 1995, a videotape excerpt of which is in the record, Bunton announced that the topic for discussion would be "corruption at the courthouse". He charged that Bentley's release of Curbo and the delay in resolving the case "makes the system look corrupt". He asserted that his accusations against the judicial system in Anderson County were "true". He admonished Bentley to "clear this case off your docket and quit hanging it over these people's heads". He also discussed the Harding matter and explained why he thought Bentley and Hubert had

both acted illegally. Bunton claimed to have made lengthy investigations of both matters, reviewing records and interviewing employees at the courthouse. He dared Bentley and Hubert to call in or come on the program and show that his allegations were untrue:

[28] Bascom, you and Mickey call in and say it ain't true. Say, "Joe Ed, you're lying. You're telling untrue things about it." I dare you. You're welcome to come in here. You can come out here. You can call in here. The fact is, y'all are corrupt, y'all are the criminals, y'all are the ones that oughta be in jail.

[29] After the program, Bentley telephoned Bunton's home and left word for him to call back. Bunton did not return the call. Bentley also called "Q&A; and asked a volunteer there to tell Bunton to stop calling him corrupt. The volunteer acknowledged that Bunton was "going too far" but said that Bunton was "out of control" and there was nothing to be done.

[30] A videotape of the "Q&A; program two weeks later, on June 20, shows Bunton reporting that Bentley had threatened to sue for defamation based on the June 6 program. In fact, Bentley did not sue until almost eight months later. On the program, Bunton asserted: "I stand by everything that I said that night and I'm gonna give you more tonight about this issue." Bunton again challenged Bentley to come on the program and deny the allegations. Bunton repeatedly stated that Bentley was not doing his job or earning his salary. He asserted that his accusations were supported by records at the courthouse. Holding up copies of some records that he had

obtained, Bunton said: "You can't sue anybody for slander when they're telling the truth, and this is the truth, and there is no libel or slander in this, not on our part. If it is, it's on the part of the records in the courthouse, and I don't believe that's the case." Later in the program, Bunton referred to a "clique" of public officials and others in Palestine, Bentley included, who often lunched together. Bunton finished by saying that "the five most corrupt political officials at the county level, in alphabetical order, would be Bentley, [District Judge Sam] Bournias, [District Judge Jerry] Calhoon, [District Attorney Jeffrey] Herrington, and [Sheriff Mickey] Hubert -top five, the most corrupt public officials."

[31] The videotape of the June 27 "Q&A; program shows Bunton inviting viewers to call in and register their views on whether Bentley was corrupt. At the bottom of the television screen was this legend: "Q&A;POLL: IS JUDGE BENTLEY CORRUPT?" Bunton then told viewers he would again discuss Bentley's "corruptness, my opinion, but you'll have to make up your own opinion." Bunton recounted his version of the Curbo case as he had on the June 6 and June 20 broadcasts, based on what he again said was an "investigation" of the facts and records which he said could be obtained at the courthouse. He reiterated that he had invited Bentley to be on the program to disprove the allegations of corruption but that Bentley had not accepted the invitation and had instead threatened suit. Bunton said he welcomed the suit because "the facts are with us and this is the truth, and therefore it is not slander." He repeated that his assertions were based on public records and complained that although he had provided copies to the local newspaper, it had not written a story.

[32] On the same program, Bunton again referred to "self-confessed clique-ers" who were Bentley's "cronies" and continued: "You know, last week one of the things that we did, or I did, was that I came up with what I think are the five most corrupt elected officials in Anderson County, and in alphabetical order they are Judge Bentley, Judge Bournias, Judge Calhoon, District Attorney Jeff Herrington, and Sheriff Mickey Hubert." In response to reports he had heard that Judge Bentley was, in Bunton's words, "rather nervous and upset and just not himself" because of the allegations on "Q&A;, Bunton stated: "Well, Judge, you can expect this kind of pressure to stay on you, the full-court `Q&A; press is gonna stay onto you until you straighten up, or what really'd be better, Bascom, is just resign and get off the bench, would be the best thing you could do for Anderson County." Again referring to public records, Bunton said Bentley "is corrupt, that's my opinion."

[33] When a person called in to say that he did not see why Bentley should be criticized for being lenient with a young offender like Curbo, Bunton responded: "This is my suspicion - there's no way to prove this, but this is what my concern is." Bunton then reiterated his allegation that Bentley had delayed resolution of the Curbo case to "use" Curbo's father, who had been a candidate for mayor. He hypothesized that

[34] [Curbo's] father would be told, "We need you to vote for this this way," and he says, "No, I don't want to do that," and they'll say, "Look, your son is looking at forty years in the state pen, and I, we could have him sentenced, and he will not get out of prison while you're alive, and you know what kind of ties we have within the Texas Department of Criminal Justice, and we can pick his roommate, and it will not be an

enjoyable time in the Texas Department of Correction."

[35] Importantly, Bunton added this:

[36] Judge Bentley has been one of the hardest people for `Q&A; to finally get some things that we could really dig our teeth in and were confident to go on the air on and go after him on because he is very, very slick. Okay? And we've known this, and we've known what he's been doing for a long time, but it's been difficult to pin down.

[37] However, Bunton claimed, court records showed that his allegations were factual. "The center of evil," he said, "is in that courthouse."

[38] Another caller, who described herself as "a good friend of Judge Bentley's", stated that the judge was "a wonderful man" and "a wonderful father". In response, Bunton asked: "All right, let me ask you this: Have you seen these records of what's gone on in this case?" When the caller said she had not, Bunton offered to make the records he had available to her, saying: "I think when you see the facts, you will have only one opinion." "The question is," Bunton went on, "is Judge Bentley corrupt? And my opinion is, based on the facts, he is."

[39] About the same time as these broadcasts, during the summer of 1995, Bunton happened to meet a long-time friend going into a store. At trial, the friend testified as follows:

[40] We - like I say, I've known [Bunton] for quite some time, and we spoke to each other as we came in [the store]. And as we began to talk, he began to speak more and more about the injustices in Palestine and Anderson County politics, and that there was some - a particular group of people referred to as "the clique" that were responsible for some of the shortcomings that we had in our government. And he was - he was telling me that he was wanting to expose all of them, and he'd bring it all to the surface, and anything that was not right with the system, he wanted to bring it out. . . . [H]e said that he had investigated and done a lot of research on all of the members - on a lot of the members he said were a part of this clique here in Palestine, and he was able to get quite a bit of information on quite a few of them that had done something that he felt like was wrong and needed to be aired. He said that the one that he really couldn't get anything on that bothered him was old Bascom Bentley. . . . [M]y response was that I told him I didn't think he would ever find anything on him because I didn't really think there was anything to find. But he said, "No, he's - he's in with that clique, and he has - he's known to associate with them. He goes out to eat with them at lunch. He's right in there with them, and he's doing something. I just don't know what it is."

[41] Notably, Bunton did not deny this account of the conversation at trial.

[42] Defendant Jackie Gates first appeared on "Q&A; on July 11 as a guest, discussing the local Crime Stoppers' list of most wanted criminals. He soon joined the program as Bunton's co-host. The two shared a military background, Gates having retired from the Air Force as a colonel with thirty-two years' service. Gates had lived in Palestine since 1990. Like Bunton and the others involved in "Q&A;, Gates was an unpaid volunteer, acting from time to time as host, investigator, reporter, director, and cameraman.

[43] Gates had never seen "Q&A; before July 11 because he was not a cable television subscriber, so he was not at first aware of the allegations Bunton had made in June that Bentley was corrupt and criminal. But he was soon made aware by Bentley himself. On October 2, Gates attended a hearing on a criminal case over which Judge Bentley was presiding. The defendant, Gerald Battles, was complaining of ineffective assistance of counsel in prior proceedings, and Gates, who was not an attorney, had been advising him. When the hearing concluded, Bentley asked Gates to step into his chambers, where they engaged in what both later recalled was a "cordial" conversation. Bentley began by warning Gates that "it was a dangerous, dangerous game for him to get involved in giving advice to inmates". Bentley then turned to "Q&A; and Bunton. He complained to Gates that Bunton's accusations of corruption were "not right". Gates agreed and told Bentley that Bunton was "a lot of times out of control" and that he, Gates, had joined the program to clean it up and stop the name-calling. At trial, Gates testified consistently that he disagreed with Bunton's accusations that Bentley was corrupt and criminal but that he could not control what Bunton said on television. Although Gates testified that he once told Bunton off the air not to call Bentley corrupt, in fact Gates appeared on many

"Q&A; programs when Bunton repeated the accusation, and on the air Gates never protested.

[44] Gates was on "Q&A; on January 30, 1996, when Bunton repeatedly referred to Bentley as "the most corrupt", "the number one corrupt", and "the ultimate corrupt" elected official in Anderson County. On that program, Bunton made four additional allegations against Bentley. One was that Bentley, along with the other district judges in Anderson County, had failed to supervise the county auditor *fn12 and county commissioners court, *fn13 who, Bunton said, should have discovered years earlier that the district attorney was not properly depositing money paid on "hot checks" and forfeited property funds in the county treasury. Another allegation was that Bentley had failed to report two other district judges, Judge Bournias and Judge Calhoon, for judicial misconduct *fn14 for dismissing petitions Bunton had filed to remove the district attorney. *fn15 A third allegation was that Bentley had contributed to the election campaigns of candidates for county judge, an officer who presides over the county commissioners court and is thus subject to the general supervisory control of the district court. *fn16 Finally, Bunton alleged that Bentley had given a criminal defendant, Carroll Neal too light a sentence for cattle theft and then refused to recognize Neal's "good time" credit given by the sheriff. Bentley, Bunton said, was "the most corrupt elected official, and if you don't believe that, all you need to do is start digging around the courthouse".

[45] On the February 1 "Q&A; program, Bunton repeated, with Gates present, that Bentley had made contributions to candidates for county judge. "That really raises a question about his integrity," Bunton stated. "It's just more to prove that

he deserves to be in the number one position of corrupt elected officials. We can talk about the Curbo deal, but it's one thing on top of the other. Judge Bascom Bentley III is the most corrupt elected official." Two weeks later Gates co-hosted the show as Bunton announced a "Bentley Hot Line" - a telephone number viewers could call to report anything Bentley had done that was "outrageous that might put a bad light on his profession as a judge or his character". Bunton coached callers on how to report on Bentley without revealing their identity. Gates testified at trial that he remembered encouraging viewers at one point to call the "hot line" with both good and bad information about Bentley to give "the entire story," but the videotapes in the record do not contain any such statement by Gates.

[46] Gates never himself used the word "corrupt" with reference to Bentley, but there is evidence that he nevertheless expressed agreement with Bunton's accusations, despite having told Bentley during their meeting in Bentley's chambers that he did not think Bentley was corrupt. During the March 7 program, a videotape shows that Bunton looked directly at Gates, who was seated beside him, while he listed the top five corrupt officials in Anderson County, with Bentley being number one. Later in the program, when Bunton told a caller that district attorney Herrington was the number one corrupt official, she reminded him that he had earlier said Herrington was number two. "He is," Bunton replied. When Gates attempted to correct him with, "Well, you said . . . ," Bunton interrupted, "Bascom Bentley's number one." "Yeah," Gates replied. Asked at trial to explain what he had meant by saying "yeah", Gates testified, "I think it was a spontaneous reaction more than anything, is all I can say."

[47] As the program continued, Bunton again returned to the Curbo case. Looking over at Gates, Bunton admonished an imaginary Bentley thus: "Now either you're just grossly incompetent or you're awful lazy, and we believe that it has to do with why you're number one on our corrupt list - is because we believe that this is corruption and cronyism tied to the mayor's race last year." Told that Bentley's sister had called in to complain that her brother was being slandered, Bunton replied: "I'm not slandering her brother because the fact of it is to be slander it has to not be true . . . . Unfortunately, your brother is corrupt. He is the most corrupt elected official in Anderson County, in my opinion."

[48] On one occasion, Gates seemed to join Bunton in his accusations against Bentley. The videotape of the December 26, 1996 "Q&A; program shows Bunton stating:

[49] There's judges in this town that says their kids come home from school and say, "Daddy, the kids at school are saying you're corrupted." Well, I'm sorry that Judge Bentley's children [he has four] say that to him. But you know what? He is corrupted, and it's a shame that your parents disgrace you like that. And they can change. All they gotta do is do right. But Judge Bentley's been caught big-time . . . .

[50] Bunton and Gates, together, then listed occurrences that showed Bentley was corrupt:

[51] BUNTON: Bascom Bentley is exactly the same way. He is corrupt. The Curbo deal does it. The Neal deal does it. I mean it's one thing after another: -

[52] GATES: Clarence George Gray [who had not previously been mentioned], Gerald Battles [the criminal defendant Gates had advised the day Gates met with Bentley in chambers] -

[53] BUNTON: - Clarence Gray, Gerald -

[54] GATES: - and there's some others besides -

[55] BUNTON: - and there's others.

[56] GATES: - Gerald Battles.

[57] BUNTON: And it's broken a lot of people's belief that

[58] Bascom Bentley is a shining star of Anderson

County. But let me tell you what: Bascom Bentley is the most corrupt elected official other than maybe [District Attorney] Jeff Herrington.

[59] On February 6, 1996, Bentley sued Bunton, Gates, and others associated with "Q&A;. The case came to trial a year later. At trial, Gates admitted that he never had any knowledge that Bentley was corrupt or criminal, but Bunton continued to assert that Bentley was both corrupt - by which he testified he meant dishonest, unethical, shady, and unscrupulous, as the word is commonly defined *fn17 - and criminal. To prove that his accusations of corruption and criminal conduct were in fact true, Bunton testified to the six matters that had been discussed on various Q&A;programs - the Curbo and Neal cases, the Harding warrant, the political contributions, and the several failures to oversee county officials and to report judicial misconduct - and to two other cases in which Bentley had revoked a criminal defendant's probation - that of Rory Beavers in one and Nathan Meyer in the other - and another judge had granted a new trial. Bentley testified at length, reviewing the details of these assertions and explaining how his conduct had been proper. Bentley also offered expert testimony by Cindy Garner, the district attorney in neighboring Houston County, and Sam Hicks, Curbo's lawyer. The evidence regarding all eight matters asserted by Bunton to show that Bentley was corrupt may be fairly summarized as follows:

[60] · The Curbo case. Although it is unusual for a court to release a defendant on personal recognizance pending a hearing on a motion to adjudicate guilt following a probation violation, it is clearly within a court's discretion to do so. *fn18 A hearing on the motion was postponed by agreement of the

district attorney and Hicks to give the boy a chance to mend his ways before facing incarceration. The agreement was not in writing, and Bunton was not aware of it because he did not talk with the district attorney or Hicks, which he could have done. Hicks testified that the pendency of the motion was to Curbo's benefit and could not reasonably have been construed as an effort to coerce Curbo's father in any way.

[61] · The Harding warrant. Bentley was not involved in any way in either the issuance or the recall of the warrant for Harding's arrest, and he had no duty to have the sheriff arrested for not executing the warrant or to convene a court of inquiry.

[62] · The "hot check" and forfeited property funds. Although for a time the district attorney did not deposit payments made by defendants on hot checks and forfeited property funds in the county treasury as required by law, *fn19 the mistake was thoroughly investigated and no wrongdoing was found. Garner testified that Bentley had nothing to do with these funds and was not required by law to force the county auditor or the commissioners court to take remedial action sooner.

[63] · The petitions to remove the district attorney. Bunton filed two petitions to remove the district attorney. After an investigation, both were dismissed, one by Judge Calhoon and the other by Judge Bournias. Bentley had nothing to do with either petition, and he was not required to report Judge Calhoon and Judge Bournias to the Judicial Conduct

Commission for acting illegally. On the contrary, neither petition had merit; both were found to have been based on personal vendettas, unfounded rumors, and a lack of knowledge of the criminal justice system.

[64] · Bentley's campaign contributions. After a runoff primary election for county judge, Bentley contributed $100 to both the winner and the loser. The winner was not opposed in the general election. Bentley's campaign treasurer received oral approval for such contributions from the Texas Ethics Commission.

[65] · The Neal, Meyer, and Beavers cases. In each of these criminal cases, Bentley's rulings were set aside. In the Neal case, Bentley erroneously attempted to issue an order nunc pro tunc correcting a sentencing order that failed to recite the plea bargain that the defendant would not be given "good time" credit. Neal was ordered released. In the Meyer case, the defendant's lawyer misunderstood Bentley to say that he would not grant a motion to revoke probation and therefore did not offer evidence. When Bentley denied the motion, Meyer moved for a new trial, and Bentley recused. Judge Calhoon ordered that Meyer be given a new trial. In the Beavers case, after sentencing the defendant, Bentley recused, and another judge granted the defendant a new trial. None of the cases involved anything other than at most an error of law by Bentley. Garner testified that it would not be reasonable for anyone to conclude that Bentley was corrupt on account of his handling of the Neal case, and Judge Calhoon testified to the same effect regarding the Meyer case.

[66] Bentley acknowledged at trial that he had not incurred any monetary loss as a result of Bunton's and Gates's conduct, but he offered evidence regarding the injury to his reputation and the mental stress he had suffered. Bunton and Gates, he testified,

[67] have taken time from me. They have ruined moments with my family, with my friends. They have - they have put a cloud over my home, my four children. And Jackie Gates, yes, sir, Mr. Gates - perhaps even more than Mr. Bunton - they have - I have - I have agonized because my name means something to me. . . . In a lot of ways, it's all I've got, and I've - the day I became judge, I appreciated that I had a position of trust, and that of all people I needed to maintain my integrity and try to be a virtuous man. I've got four children that I don't want embarrassed, and every time Mr. Gates or the rest of them opened their mouth, I know how it hurt them, how it hurt my sister, how it hurt my family.

[68] Bentley testified that the accusation against him had been "the worst thing that's happened to me in my life", going "to the very heart of what my whole life is about." Everywhere he went, he said, people would say that they had heard him called corrupt, although "most of them are well-meaning and a lot of them said it was joking". Bentley testified that he spent time worrying at home about the accusations, and that he worried about the effect on his family and the treatment of his children by their peers at school. Bentley's wife testified that the entire episode had been a "tragedy" that had "ruined Bascom's life and my children's life". Her husband, she said,

had lost sleep, suffered stress, and would never be the same. A long-time friend of Bentley's testified:

[69] Well, I think it's impacted him a lot. I've known him, like I said, for fifteen or twenty years, and I think - I think he's been downcast. I think he's been depressed and he's been sad. It's unfortunate, but I've seen a major change in the demeanor of the judge. I don't know what else I can say, but it's kinda sad the way it has affected him and his family as well.

[70] When Bentley rested his case-in-chief, the court directed a verdict for all of the defendants except Bunton and Gates. At the close of all of the evidence, the trial court granted Bentley's motion for a partial directed verdict that Bunton's accusations of corruption and criminality were defamatory per se. The jury then found that:

[71] · Bunton published defamatory statements about Bentley with "actual malice" and with "malice";

[72] · Gates agreed with Bunton's defamatory statements and published his agreement with "actual malice" and with "malice";

[73] · Bunton and Gates conspired to publish defamatory

statements about Bentley;

[74] · Bunton's conduct caused Bentley to suffer $150,000 damages in past and future loss of character and reputation, and $7 million in past mental anguish;

[75] · Gates's conduct caused Bentley to suffer $25,000 damages in past loss of character and reputation and $70,000 in past mental anguish; and

[76] · punitive damages should be assessed, $1 million against Bunton and $50,000 against Gates.

[77] Based on this verdict, the trial court rendered judgment awarding Bentley actual and punitive damages and prejudgment interest totaling $9,560,410.40 against Bunton and $163,739.72 against Gates. The trial court refused to hold the defendants jointly liable for all of the damages, despite the jury's finding that they had conspired to defame Bentley.

[78] Bunton and Gates appealed from the judgment against them, and Bentley appealed from the denial of joint liability. The court of appeals affirmed the judgment against Bunton but reversed the judgment against Gates. *fn20 The court concluded that:

[79] · the jury's finding that Bunton acted with actual malice was supported by clear and convincing evidence; *fn21

[80] · Bunton had the burden of proving that his statements were true, and failed to do so; *fn22

[81] · the jury's findings of actual damages caused by Bunton were supported by legally and factually sufficient evidence; *fn23

[82] · there is no evidence that Gates defamed Bunton; *fn24 and

[83] · Bunton and Gates were not jointly liable as co-conspirators because Bentley did not request a jury finding on what damages were caused by the conspiracy itself and the evidence did not conclusively establish that all of the damages Bunton caused were attributable to the conspiracy, such as damages resulting from statements made before the conspiracy was formed and never ratified by Gates. *fn25

[84] Bentley and Bunton petitioned for review, and we granted both petitions. *fn26 They, along with respondent Gates, have raised numerous issues. We begin (in Part II) with

the defendants' threshold claim that the Texas Constitution affords them greater protection than the First Amendment. We then consider the issues related to liability: whether the defendants' statements were capable of defamatory meaning (Part III), whether those statements were false (Part IV), and whether the defendants acted with actual malice (Part V). Next we turn to the issues related to damages (Part VI). Finally, we consider the appropriate action in light of our conclusions (Part VII).

[85] II.

[86] Bunton and Gates claim the protections of article I, section 8 of the Texas Constitution, as well as those of the First Amendment to the United States Constitution. Article I, section 8 states:

[87] Freedom of speech and press; libel

[88] Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts,

under the direction of the court, as in other cases. *fn27

[89] Both defendants point out that this Court has sometimes called the state guarantee of free speech "broader", *fn28 but neither of them explains how differences in the two constitutional provisions affect this case. The mere assertion that the state provision is broader than the federal means nothing. As we said in Commission for Lawyer Discipline v. Benton:

[90] This Court has recognized that "in some aspects our free speech provision is broader than the First Amendment." However, to assume automatically "that the state constitutional provision must be more protective than its federal counterpart illegitimizes any effort to determine state constitutional standards." If the Texas Constitution is more protective of a particular type of speech, "it must be because of the text, history, and purpose of the provision." *fn29

[91] Bunton and Gates make no attempt to show how the text, history, or purpose of the state constitutional provision affords them greater protection than the First Amendment.

[92] If anything, in the context of defamation, the First Amendment affords more protection. Recently, in Turner v. KTRK Television, Inc., we explained:

[93] Although we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that "broader protection, if any, cannot come at the expense of a defamation claimant's right to redress." Unlike the United States Constitution, the Texas Constitution expressly guarantees the right to bring reputational torts. The Texas Constitution's free speech provision guarantees everyone the right to "speak, write or publish his opinions on any subject, being responsible for abuse of that privilege." Likewise, the Texas Constitution's open courts provision guarantees that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." While we have occasionally extended protections to defamation defendants greater than those offered by the United States Constitution, we have based these protections on the common law, not the Texas Constitution. *fn30

[94] As Chief Justice Phillips correctly stated several years ago, after thoroughly reviewing the history of article I, section 8, "[N]othing in the language or purpose of the Texas Free Expression Clause authorizes us . . . to afford greater weight in the balancing of interests to free expression than we would under the First Amendment . . . ." *fn31

[95] In some cases we have applied state constitutional provisions before considering similar provisions of the federal constitution, *fn32 but in others we have not. *fn33 No rigid order of analysis is necessary, despite occasional language to

the contrary in some of our opinions. *fn34 Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the First Amendment and simply assume that its concerns are congruent with those of article I, section 8.

[96] III.

[97] We now turn to Bunton's and Gates's arguments that their statements were expressions of opinion rather than statements of fact and were not capable of defamatory meaning.

[98] A.

[99] It is well settled that "the meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements." *fn35 This is also true in determining whether a publication is an actionable statement of fact or a constitutionally protected expression of opinion.

[100] To distinguish between fact and opinion, we are

bound to use as our guide the United States Supreme Court's latest word on the subject, Milkovich v. Lorain Journal Co. *fn36 In that case a newspaper, the Lorain Journal, reported that a high school wrestling coach, Milkovich, had "lied" during a judicial proceeding which overturned a state athletic association's sanction imposed on his team. The Court rejected the newspaper's argument that its statements were constitutionally protected opinion. The Court began its analysis by explaining that early common law did not distinguish between factual statements and opinions in imposing liability for defamation, but

[101] due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of `fair comment' afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *fn37

[102] After surveying the constitutional limitations on defamation liability in its own opinions, the Court concluded that it was unnecessary to create a separate privilege for "opinion" defined by some multi-factor test, as some courts had done. *fn38 "[W]e think the `"`breathing space"" which `"`[f]reedoms of expression require in order to survive,""" the Court said, "is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between `opinion' and fact." *fn39 Included in that doctrine, the Court explained, are the following principles:

[103] · "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved" and "where public-official or public-figure plaintiffs [are] involved;" *fn40

[104] · the Constitution protects "statements that cannot `reasonably [be] interpreted as stating actual facts' about an individual" made in debate over public matters in order to "provide[] assurance that public debate will not suffer for lack of `imaginative expression' or the `rhetorical hyperbole' which has traditionally added much to the discourse of our Nation;" *fn41

[105] · "where a statement of `opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth", and "where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault"; *fn42 and

[106] · "the enhanced appellate review required by Bose Corp. [v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)] provides assurance that the foregoing determinations will be made in a manner so as not to `constitute a forbidden intrusion of the field of free expression.'" *fn43

[107] How these principles apply in a given case are, of course, questions of law. *fn44

[108] The analysis prescribed by Milkovich supplants various proposed dichotomies between fact and opinion. For example, more than a decade before Milkovich, section 566 of the Restatement (Second) of Torts set out a rule making a statement of opinion actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *fn45 Six years before Milkovich, Prosser and Keeton on Torts proposed a three-part classification of opinions as either deductive, evaluative, or informational. *fn46 About the same time, the United States Court of Appeals for the District of Columbia Circuit in Ollman v. Evans designed a four-part test for distinguishing between fact and opinion. *fn47 In lieu of such distinctions, Milkovich focuses the analysis on a statement's verifiability and the entire context in which it was made. *fn48

[109] With this direction, we examine the evidence in this case.

[110] B.

[111] Bunton referred to Bentley's actions as "criminal" only once, which was during the June 6 "Q&A; broadcast. After

describing the Curbo case, in which he faulted Bentley for having released the defendant on a personal bond and delayed final adjudication, Bunton suddenly exclaimed: "y'all" - referring to Bentley and Sheriff Hubert - "are corrupt, y'all are the criminals, y'all are the ones that oughta be in jail." Nothing that preceded this statement would have led a reasonable person to think that Bunton was asserting that Bentley had actually committed a crime. Bunton barely alluded to the theory he later espoused that Bentley had handled the case in a way to pressure the defendant's father, which, if true (it was not), would undoubtedly have been criminal. All Bunton said on this subject during the June 6 program was that Bentley should "quit hanging [the case] over these people's heads". By itself, Bunton's single, excited reference to Bentley as a "criminal" might be taken to be rhetorical hyperbole, although hardly of any sort that, in the words of Milkovich, "has traditionally added much to the discourse of our Nation." *fn49 In context, however, Bunton's characterization of Bentley's conduct as criminal is only part of Benton's efforts over many months to prove Bentley corrupt.

[112] By calling Bentley "corrupt", Bunton testified that he intended the word's ordinary meaning - dishonest, unethical, shady, and unscrupulous - and we think that is what any reasonable viewer would have understood. While the word may be merely epithetic in the context of amorphous criticism, *fn50 it may also be used as a statement of fact that can be proved true or false, *fn51 just like the word "liar" applied to Coach Milkovich. Examples abound. When the Athenian court accused Socrates of corrupting the minds of the young, it intended to indict, not merely insult. *fn52 Corrupt conduct, determined as a matter of fact, may be punished under Texas law in numerous situations. *fn53 Accusing a public official of corruption is ordinarily defamatory per se. As Prosser and

Keeton on the Law of Tort states: "it is actionable without proof of damage to say of a . . . public officer that he has . . . used his office for corrupt purposes . . . since these things obviously discredit [one] in his chosen calling. *fn54 Consistent with this rule, we held in A. H. Belo & Co. v. Looney that detailed accusations of corruption against a public official are not protected opinion, explaining:

[113] "There is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the . . . character of a public man, and to ascribe to him base and corrupt motives, he must do so at his peril; and must either prove the truth of what he says, or answer in damages to the party injured." *fn55

[114] Although Looney's allocation of the burden of proof is no longer correct, *fn56 in other respects the opinion appears to express the sentiment of most courts. The Maryland Supreme Court has observed:

[115] The greater number of Courts have held that the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such not to be within the defense of fair comment. *fn57

[116] Whether Bunton's repeated accusations that Bentley was corrupt were statements of fact or expressions of opinion depends, according to Milkovich, on their verifiability and the context in which they were made. As the court in Ollman stated: "It is one thing to be assailed as a corrupt public official by a soapbox orator and quite another to be labelled corrupt in a research monograph detailing the causes and cures of corruption in public service." *fn58 But much ground lies between these two extremes. While "Q&A; certainly never delivered anything approaching a research monograph on Bentley's conduct in office, and Bunton's ravings were often classic soapbox oratory, Bunton plainly and repeatedly stated that his accusations of corruption were based on actual fact. He cited specific cases and occurrences and pointed to court records and public documents. He claimed to have made lengthy investigations and interviewed courthouse employees and others. It had been hard, he told a friend and one viewer who called in to the program, to find a basis for accusing Bentley. He claimed to have looked into the law pertaining to personal bonds, case disposition guidelines, judicial ethics, the sheriff's responsibilities, and the district court's supervisory responsibility over the county auditor and county commissioners court. When challenged by viewers who called in, Bunton refused to argue about whether Bentley was a good or bad judge or person; on the contrary, he told one caller that Bentley's personal character was irrelevant. Bunton constantly insisted that his charges were borne out by objective, provable facts. Indeed, he invited Bentley to appear on the show, not to debate the issues, but to answer the factual allegations and disprove that he was corrupt. It is true that Bunton often also said that it was his opinion that Bentley was corrupt. But as the Supreme Court explained in Milkovich:

[117] If a speaker says, "In my opinion John Jones is a

liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words `I think.'" See Cianci [v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir., 1980)]. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment a (1977). *fn59

[118] Furthermore, Bunton repeatedly insisted that evidence he had seen but had not disclosed supported his assertions. He had reviewed many public records, he said, and talked with courthouse employees. Much other information was publicly available, he continually assured viewers, to substantiate Bentley's corruption in office. He encouraged callers to investigate this information for themselves and to report other misconduct that he strongly suggested could be found for the looking. Even under the common law rule stated in section 566 of the Restatement (Second) of Torts (to which Milkovich refers) that requires an implication of undisclosed facts for an opinion to be actionable, Bunton's statements were defamatory.

[119] Throughout the trial, Bunton insisted that his statements that Bentley was corrupt were verifiably true and could be proved. Bunton's attorney told the jury in his opening statement:

[120] We're going to prove the truth of each and every statement, or we're going to prove that there was an investigation in an attempt to learn the truth, the truth was concealed. There was no disregard for the truth. There was an attempt to get it.

[121] During the presentation of the evidence, Bunton identified eight discrete instances that he said showed Bentley's corrupt conduct in office. He cited to details himself, and attempted to elicit factual and expert testimony from other witnesses, not merely to substantiate his personal opinions, but to prove his statements true. In his summation, Bunton's attorney went over each instance on which Bunton had based his charges of corruption and attempted to show how they had been proved true. Bunton's consistent position at trial that his accusations of corruption were true is a compelling indication that he himself regarded his statements as factual and not mere opinion, right up until the jury returned its verdict.

[122] An important part of the context of the defendants' statements here is that they were made on public access television. Federal law permits local authorities to require cable television operators to provide public access channels. *fn60

Commenting on that law, a committee of the U.S. House of Representatives observed:

[123] Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. [Public, educational, and governmental] channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work. *fn61

[124] Public access programming is not network news. Usually, it is informal and is not professionally scripted or produced. It often does not project the credibility that other television broadcasts have. "Q&A; was in this mold - in Bunton's words, "a wide-open, sometimes caustic and/or an uncivilized public forum". Bunton's accusations on "Q&A; must be considered in that context. By the same token, however, statements are not incapable of defamation or absolutely protected from liability merely because they are made on public access television. A soap box, electronic or wooden, does not lift a speaker above the law of liability for defamation. Besides, as the congressional committee noted, public access television is not only a "soap box" forum but also provides educational and governmental information.

[125] The clear import of Bunton's statements on "Q&A; was that Bentley was corrupt as a matter of verifiable fact, as

Bunton continued to assert at trial. Accordingly, we reject Bunton's argument on appeal that his accusations of corruption were constitutionally protected opinion.

[126] C.

[127] Gates also argues that his own comments on two "Q&A; programs were opinion and in any event were not capable of defamatory meaning.

[128] The videotapes of "Q&A; program excerpts played at trial showed Gates and Bunton sitting side by side numerous times while Bunton asserted that Bentley was corrupt. For the most part, Gates exhibited no reaction to Bunton's statements, but on two programs Gates seemed to express his agreement with Bunton's statements that Bentley was corrupt. On one occasion, Gates attempted to correct Bunton's misstatement to a caller that district attorney Herrington was the most corrupt official in Anderson County. Bunton interrupted that Bentley was "number one", and Gates replied, "Yeah." On the other occasion, Bunton stated that "one thing after another" showed that Bentley was corrupt, citing two situations he had previously described. Gates then named two other situations, adding "and there's some others besides." At trial, Gates explained that he did not intend to express agreement with Bunton on either occasion. The first time, Gates said, his "yeah" was merely an acknowledgment that Bunton had corrected himself. In Gates's words: "I think it was a spontaneous reaction more than anything, is all I can say." The second time, Gates explained, he was merely helping Bunton list the

examples Bunton had cited without meaning to endorse any of them himself.

[129] The jury did not believe Gates; rather, they found that "Jackie Gates agreed with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt". The jury saw Gates on the videotaped programs and on the witness stand, and they were entitled to judge his credibility by his demeanor and testimony. Even if we assume that Gates's "yeah" on the one occasion was ambiguous, the jury could reasonably conclude that on the second occasion when Gates not only appeared to concur in Bunton's assertions but listed examples of his own, examples which Bunton had not mentioned but immediately endorsed, Gates was expressing his agreement with Bunton's defamatory statements.

[130] The jury was not, of course, entitled to base their conclusion simply on Gates's and Bunton's joint appearances on "Q&A; programs. We do not suggest for a moment that a talk show host is liable for a guest's statements to which the host does not voice objection. The mere fact that people appear together is no evidence that they agree; on the contrary, television interviews more often than not indicate nothing about the host's views, much less the broadcaster's. But the jury had much more than mere joint appearances to support their finding. The jury could reasonably have determined that Gates was not being truthful in discounting his statement since he had been present on many "Q&A; programs when Bunton accused Bentley of corruption and had never protested, even though he testified that he told Bentley that he was joining "Q&A; to discourage Bunton from continuing to make the accusations. The evidence permitted the jury to find that Gates

did not merely hold Bunton's coat at the stoning of Bentley, but threw rocks himself.

[131] Judging Gates's words from the perspective of a reasonable listener, as we must, we conclude that they could easily have been considered defamatory as the jury found.

[132] IV.

[133] Next, we consider Bunton's and Gates's arguments that their statements were not false.

[134] A.

[135] Bunton and Gates contend that Bentley has the burden of proving that they made false statements about him because he is a public official and also because they are media defendants. We agree that to recover for defamation, a public official like Bentley must prove that defamatory statements made about him were false. *fn62 Accordingly, we need not consider whether Bunton and Gates's use of public access television casts them as "media defendants" or whether, if it did, a plaintiff against them who was not a public figure would also be required to prove falsity. *fn63 The court of appeals erred in holding that the defendants were required to prove as

an affirmative defense that their statements were true. *fn64 We have not required proof of falsity to be by more than a preponderance of the evidence, *fn65 and neither has the United States Supreme Court. *fn66 If the evidence is disputed, falsity must be determined by the finder of fact.

[136] In this case, the trial court refused Gates's request to inquire of the jury whether statements about Bentley were false. The court appears to have been of the view that the issue was subsumed in Bentley's motion for a partial directed verdict that Bunton's statements were defamatory per se, even though the falsity of those statements was not mentioned in the argument or ruling on the motion. That a statement is defamatory -that is, injurious to reputation - does not mean that it is false, and vice versa. After the verdict was returned, the defendants argued that the issue of falsity had not been raised by Bentley's motion. The court disagreed, reciting in its judgment that by granting Bentley's motion it had "ruled as a matter of law that [Bunton] had published false and defamatory statements about [Bentley] by accusing him of being corrupt and a criminal."

[137] The defendants argue that because the trial court denied them a jury finding on falsity and the evidence on that issue was disputed, they are entitled to a new trial. Bentley argues that no finding was necessary because the evidence conclusively established that the statements about him were false, as the trial court determined by granting his motion for partial directed verdict. Alternatively, Bentley argues that by finding that Bunton and Gates acted with actual malice - that is, knowledge of, or reckless disregard for, the falsity of their statements - the jury implicitly found that their statements

were false, and that implicit finding is supported by at least some evidence.

[138] Strictly as a matter of logic, the jury's finding that Bunton and Gates acted with actual malice does not necessarily imply that the statements made were false, inasmuch as the jury could have believed, as they were instructed, that Bunton and Gates acted "with reckless disregard as to [the] truth or falsity" of the statements. As a practical matter, however, it is highly unlikely that the jury would have found that Bunton and Gates made true statements with actual malice - that is, with reckless disregard for whether the statements were true. Bentley's implied finding argument is therefore not without force. But we need not determine whether a finding of falsity can be implied from the verdict in this case because, as we explain below, Bentley proved conclusively that the statements that he was corrupt and criminal were false. Accordingly, we accept the trial court's statement in its judgment that it determined the issue as a matter of law.

[139] B.

[140] Bunton based his statements that Bentley was corrupt - by which Bunton meant dishonest, unethical, shady, and unscrupulous - on the eight situations we have already described in detail, and nothing else. Accordingly, the issue before us is whether Bentley proved without contradiction that none of those situations showed that he was criminal or corrupt in any way. Without repeating unnecessarily the evidence we have already set out, we examine each of the eight

bases Bunton has claimed for his accusations:

[141] The Curbo case: First, Bunton suggested on the June 6, 1995 "Q&A; program that Bentley acted improperly in releasing Curbo without a surety bond, although Bunton now tells us in his brief that he "never made the allegation that the bond matter made Bentley corrupt." Bentley's action was authorized by statute, *fn67 and Curbo's attorney, Hicks, testified that there was nothing unusual about Curbo's release without bond. Next, Bunton asserted on various programs that Bentley delayed a final adjudication in the case to pressure Curbo's father in the event he was elected mayor. Bentley testified that he had no such motive, Hicks testified that the charge was "a load of bull", and in any event, Curbo's father was not elected mayor. Further, Bunton argues that the case should not have been delayed so long or at the request of the district attorney. Bentley and Hicks testified that the delay was proper and benefitted Curbo by giving him one last chance to correct his ways. Their testimony was supported by letters in the court file from Curbo's probation officer. There was no evidence that delay was improper. Finally, Bunton makes two arguments he did not raise at trial: that Bentley had improper ex parte discussions with Curbo's probation officer, and that it was illegal for the district attorney and Curbo's attorney to revise the terms of Curbo's probation. There is no evidence to support either argument; on the contrary, Hicks testified that Bentley did "absolutely nothing" improper in handling the Curbo case, and that the charge that Bentley's conduct in the case was corrupt was "a lie."

[142] The Harding warrant: Bunton asserts that Bentley had a legal duty to require the sheriff to execute an arrest

warrant that Bentley did not issue and that the district attorney caused to be withdrawn. Bentley testified that he was not connected with the incident in any way, and as a matter of law, he had no legal duty to require the sheriff to execute a warrant that had been withdrawn.

[143] The "hot check" and confiscated property funds: Bunton contends that if Bentley had properly supervised the county auditor and the county commissioners court, they would have discovered sooner that the district attorney was not properly depositing the money that defendants paid on "hot checks" and the money obtained from property forfeitures in the county treasury as the law required, but was administering those funds himself. While district courts have general supervisory control over county commissioners courts, *fn68 there is no suggestion or claim that this jurisdiction was invoked, much less that any district court exercised it improperly. And while district courts in most counties, including Anderson County, have the power to appoint and remove a county auditor, under certain circumstances, *fn69 there is no evidence that Bentley or the other district judges in Anderson County exercised their authority improperly. On the contrary, Houston County District Attorney Garner, who investigated the handling of the funds, testified that Bentley had "nothing to do" with them, that there was "no possibility" that he could have been corrupt on account of the way they were handled, and that in fact there was no wrongdoing at all in connection with the funds, either on the part of Anderson County District Attorney Herrington or anyone else. No evidence contradicts Garner's testimony.

[144] The petitions to remove the district attorney:

Bunton compl[illegible]that Bentley should have reported two of his colleagues, Judge Bournias and Judge Calhoon, for judicial misconduct in denying petitions Bunton filed to remove the district attorney. Bentley testified that he had nothing to do with either petition. Garner, who investigated the petitions, reported that there was no basis for them, and that they had been motivated entirely by personal vendettas, unfounded rumors, and a lack of knowledge of the criminal justice system. There is no evidence or authority that the rulings were incorrect, or that Bentley would have had a duty to report the judges even if they had ruled in error.

[145] Bentley's campaign contributions: Bentley contributed to both the winner and loser of the runoff election in the Democratic primary for county judge of Anderson County, after that election was over. Bunton argues that the contributions were improper because the district judges supervise the county judge. *fn70 Bentley testified that his contributions were meant to help each candidate defray lingering expenses and were proper. Bentley volunteered that he would not have contributed to any opposed candidate. Bunton testified that even though the winning primary candidate had no announced opposition in the general election, the possibility of a write-in campaign remained. No such campaign occurred, and there is no evidence that it was ever more than an abstract possibility. There is no evidence or legal basis for thinking that Bentley's contributions were corrupt, even if they had been made to opposed candidates. Moreover, Bentley's campaign treasurer testified that he received oral approval for the contributions from the Texas Ethics Commission. As a matter of law, Bentley's contributions were not improper, let alone corrupt.

[146] The Neal, Meyer, and Beavers cases: Bentley's rulings in each of these three cases was determined to have been erroneous. In the Neal case, he improperly attempted to issue a nunc pro tunc sentencing order. District Attorney Garner testified that it was "totally unreasonable" to think that Bentley's conduct in the case was criminal or corrupt. In the Meyer case, Judge Calhoon ordered a new trial after Bentley revoked Meyer's probation, based upon counsel's asserted misunderstanding of Bentley's rulings. Judge Calhoon testified at trial that it "makes no sense" that anyone, even a layman, would "interpret[]", "interpolate[]", or "pull[] out" of his decision that Bentley was corrupt or criminal. In the Beavers case, Bentley testified that he had only made an error in judgment, and there was no other evidence regarding the case. As to all three cases, there was evidence that Bentley's actions were not criminal or corrupt, and no evidence that his rulings were dishonest or unethical. In each case, all that can be said is that Bentley was found, on ordinary review, to have committed an error in judgment. As one court has noted: "Where an official having discretion in a certain matter acts upon his judgment in good faith, although erroneously, such act is not corrupt". *fn71

[147] Bunton also contends that his statements about Bentley were taken out of context. The trial court admitted into evidence two videotapes containing about sixty minutes of "Q&A; broadcasts excerpted from twelve ninety-minute programs. One of the excerpts received in evidence was twenty-one minutes long, one was eleven minutes long, and three others were more than five minutes long. Bunton argues that the excerpts misleadingly lifted his statements out of context, but he does not explain how his assertions that Bentley was corrupt could have appeared less offensive if viewed as

part of a longer broadcast. His only specific complaint is that Bentley did not offer in evidence the results of the "Q&A; viewer polls on whether he was corrupt. That omission does not make the videotapes misleading. Nothing about the excerpts themselves, which we have reviewed, indicates that they are misleading in any way. Moreover, Bunton did not offer into evidence tapes or transcripts of the entire programs that were excerpted or of other programs not shown at all that would cast his comments in a different light. Gates offered a videotape of one program that was excluded because it had not been timely produced during discovery. That tape is not in our record, and there is no indication that it would have shed a different light on the others. Bunton's argument that the broadcast excerpts were misleading simply has no support in the record, and therefore we reject it.

[148] In sum, the evidence not only supports but conclusively establishes that Bunton's charges that Bentley was corrupt were utterly and demonstrably false as a matter of law. As Garner testified, in twelve years of practice she had never known Bentley to engage in any conduct that could remotely be called criminal or corrupt. At trial, Gates did not disagree, and Bunton offered no evidence whatever to the contrary.

[149] V.

[150] Next, we consider Bunton's and Gates's arguments that they did not act with actual malice.

[151] A.

[152] In the seminal case of New York Times Co. v. Sullivan, *fn72 the United States Supreme Court held that to protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *fn73 the First Amendment precludes a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. *fn74 Since then, the Supreme Court has explained that "[t]he phrase `actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will" *fn75 -common connotations of the word "malice" but rather is "a shorthand to describe the First Amendment protections for speech injurious to reputation". *fn76 Those protections for speech about a public official turn on the speaker's degree of awareness that the statements made are false. In the Supreme Court's words:

[153] Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection. *fn77

[154] Thus, actual malice means knowledge of, or reckless disregard for, the falsity of a statement. *fn78

[155] Knowledge of falsehood is a relatively clear standard; reckless disregard is much less so. Reckless disregard, according to the Supreme Court, is a subjective standard *fn79 that "focus[es] on the conduct and state of mind of the defendant." *fn80 It requires more than "a departure from reasonably prudent conduct." *fn81 Mere negligence is not enough. *fn82 There must be evidence "` that the defendant in fact entertained serious doubts as to the truth of his publication,'" *fn83 evidence "that the defendant actually had a `high degree of awareness of . . . [the] probable falsity'" *fn84 of his statements. Thus, for example, the failure to investigate the facts before speaking as a reasonably prudent person would do is not, standing alone, evidence of a reckless disregard for the truth, *fn85 but evidence that a failure to investigate was contrary to a speaker's usual practice and motivated by a desire to avoid the truth may demonstrate the reckless disregard required for actual malice. *fn86 As the Supreme Court has observed, "Although courts must be careful not to place too much reliance on such factors [i.e., motive and care], a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *fn87 "In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full." *fn88

[156] While these concepts assist in understanding and

applying the "reckless disregard" standard, the Supreme Court has cautioned that the phrase "cannot be fully encompassed in one infallible definition." *fn89 "The mental element of 'knowing or reckless disregard' required under the New York Times test . . . is not always easy of ascertainment." *fn90 "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases". *fn91 This does not mean that courts must

[157] "scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." [T]his approach would lead to unpredictable results and uncertain expectations *fn92

[158] The import of the Supreme Court's admonitions is that the boundaries of actual malice, and particularly reckless disregard, cannot be fixed by the defining words alone but must be determined by the applications of those words to particular circumstances. Actual malice is defined in important part by example. Necessarily, then, to more fully understand "reckless disregard", we must survey the Supreme Court's application of the standard in concrete cases.

[159] The Supreme Court's most recent application of the "reckless disregard" standard was in Harte-Hanks Communications, Inc. v. Connaughton. *fn93 Connaughton, a candidate for judicial office, had persuaded a certain Stephens

a few weeks before the election to give him a recorded statement regarding instances in which she had bribed an employee in the incumbent judge's office. Stephens's sister, Thompson, was present along with a number of other people when Stephens gave Connaughton her statement. A few days before the election Thompson told the local newspaper that Connaughton had used "dirty tricks" to get Stephens's statement, intending to present it to the incumbent judge privately and force the judge's resignation before the election. The newspaper published Thompson's account of the events as true. Connaughton sued, and a jury found that the newspaper had acted with actual malice. The jury awarded Connaughton $5,000 in compensatory damages and $195,000 in punitive damages, the trial court rendered judgment on the verdict, and the court of appeals affirmed. The Supreme Court held that while "[[t]here is little doubt that `public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the [actual malice standard],'" *fn94 the newspaper acted with actual malice because: it ignored the fact that all of the persons present when Stephens gave her statement denied that Connaughton had acted improperly; it declined to listen to the Stephens tape itself and did not interview Stephens; Thompson's story was highly improbable given that Connaughton had not misused the tape but had simply turned it over to law enforcement authorities; and Thompson's hesitating demeanor at the newspaper offices reflected in her taped interview suggested a lack of veracity as compared with Connaughton. *fn95

[160] The Supreme Court in Harte-Hanks noted how similar the facts in that case were to those in Curtis Publishing Co. v. Butts. *fn96 In Curtis Publishing, the Saturday Evening Post published an article accusing Wally Butts, the athletic

director of the University of Georgia, of having fixed a football game with Paul "Bear" Bryant, football coach at the University of Alabama. The story was based on an affidavit by an insurance salesman who claimed to have overheard a telephone conversation a week before the game in which Butts described for Bryant his plays and game plan. Butts had retired before the story ran. The article concluded:

[161] The chances are that Wally Butts will never help any football team again. . . . The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. *fn97

[162] Butts sued. To prove that the magazine had acted with actual malice, Butts offered evidence at trial that although the editors recognized the seriousness of the charges being made and the importance of a full investigation, they ignored elementary precautions; that they ignored the fact that their informant was on probation for bad check charges and sought no independent corroboration, even though another person also claimed to have overheard the conversation; that the reporter did not view films of the game or consult with football experts to determine whether the game appeared to have been fixed the way it was played; and that "the Saturday Evening Post was anxious to change its image by instituting a policy of `sophisticated muckraking,' and the pressure to produce a successful expose might have induced a stretching of standards." *fn98 The jury awarded Butts $60,000 in actual damages and $3 million in punitive damages, but the trial court reduced the total to $460,000 by remittitur. The court of

appeals affirmed. The Supreme Court also affirmed, concluding that the evidence clearly showed that the magazine had acted with actual malice in publishing the article after a "grossly inadequate" investigation, *fn99 despite Butts's denial of the allegations, and "with full knowledge of the harm that would likely result from publication of the article." *fn100

[163] By contrast, the Supreme Court just as readily concluded that actual malice had not been proved in a companion case to Curtis Publishing, Associated Press v. Walker. *fn101 There, a reporter had provided an eyewitness account of the violence that occurred when federal marshalls attempted to enforce a federal court decree that James Meredith be permitted to enroll at the University of Mississippi. The reporter stated that Walker, a private citizen and retired army veteran, had led a riot against the marshalls. Walker claimed that this was false and that in fact, while he was present at the time, he had counseled restraint. A jury found that Walker had been defamed, had suffered $500,000 in actual damages, and should have been awarded $300,000 in punitive damages. The trial court rendered judgment for the actual damages but not the punitive damages, concluding that there was no evidence of malice to support such an award. The Supreme Court determined that Walker was a public figure subject to the actual malice standard because he had purposefully thrust himself "into the `vortex' of an important public controversy;" *fn102 that discrepancies in the published account were insignificant; that the reporter was experienced and reliable; and that the evidence supported the trial court's determination that there was no evidence of ill will, a complete lack of care, or conscious indifference of Walker's rights.

[164] In Time, Inc. v. Pape, *fn103 Time Magazine reported on a federal commission's study of police brutality. The study stated in essence that allegations in specific cases demonstrated a problem that demanded discussion, thus encouraging the reader to believe that the allegations were probably true while stressing that they were only allegations - a statement the Supreme Court said could "fairly be characterized as extravagantly ambiguous." *fn104 In its story, Time set out some of the circumstances described in the study but did not state that they were merely allegations. One officer mentioned in the story sued. The trial court directed a verdict for the defendant, but the court of appeals reversed. The Supreme Court upheld the trial court, concluding:

[165] Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under New York Times. *fn105

[166] In a very different context, the Supreme Court reiterated its view that actual malice cannot be based on a misinterpretation of ambiguous facts that is not unreasonably erroneous. In Bose Corp. v. Consumers Union of United States, Inc., *fn106 a writer for Consumer Reports described a Bose sound system as making instruments sound as if they were "wander[ing] about the room." *fn107 Bose sued for product disparagement. At trial, the writer testified that the system actually made instruments sound as if they were moving along the wall, which he said meant the same thing as what he had published. The trial court found that the two descriptions were

plainly at odds, that the published comment was false, that the defendant's efforts at trial to explain away the error showed actual malice, and that Bose should recover about $125,000 in actual damages. The Supreme Court agreed with the court of appeals' reversal of the judgment, concluding that the writer's adoption of a new description of the system at trial proved only that he had "a capacity for rationalization", *fn108 not that he knew he was wrong at the time he first reviewed the sound system. The earlier description merely "reflect[ed] a misconception," *fn109 the Supreme Court said, which was not the equivalent of actual malice.

[167] As already noted, the mere failure to investigate the facts, by itself, is no evidence of actual malice. Thus, in Beckley Newspapers Corp. v. Hanks, *fn110 the Supreme Court held that a newspaper's failure to conduct an investigation before criticizing a county clerk for opposing fluoridation of the local water supply was no evidence of actual malice. The Supreme Court cited its decision in the New York Times case, which concluded that the newspaper's failure to check its own files to determine the accuracy of an advertisement critical of the local government's handling of racial unrest before having it published was no evidence of actual malice, especially since the newspaper had relied on a number of credible people in making the statements it did. *fn111 But there was other evidence of actual malice in New York Times: the statements made, though reasonable, were not entirely true, and when the newspaper was confronted with the errors, it at first refused to retract the statements. The Supreme Court did not dismiss the libel claims in that case but remanded them for a new trial. *fn112

[168] Finally, in St. Amant v. Thompson, *fn113 Thompson, a deputy sheriff, sued St. Amant, a candidate for public office, for quoting Albin, a member of a local union involved in an internal union dispute, as saying that Thompson had misused his office to help the union president. A jury awarded Thompson $5,000. The Supreme Court held that Thompson had not proved actual malice with evidence that St. Amant had no personal knowledge of Albin's statements, that he had made no attempt to verify those statements, and that he had acted without regard for the injury Thompson might suffer. On the contrary, the Court reasoned, the evidence showed that St. Amant reasonably believed Albin, whom he had known for several months, because "Albin seemed to St. Amant to be placing himself in personal danger by publicly airing the details of the dispute." *fn114 Reflecting on the consequences of the actual malice standard, the Supreme Court explained:

[169] It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that

the First Amendment protect some erroneous publications as well as true ones. *fn115

[170] While insisting that evidence of actual malice be convincing, the Supreme Court stressed that proof of actual malice could not be defeated with simply the defendant's self-serving protestations of sincerity:

[171] The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *fn116

[172] To summarize, the actual malice standard requires that a defendant have, subjectively, significant doubt about the truth of his statements at the time they are made. To disprove actual malice, a defendant may certainly testify about his own thinking and the reasons for his actions, and may be able to negate actual malice conclusively. *fn117 But his testimony that he believed what he said is not conclusive, irrespective of

all other evidence. The evidence must be viewed in its entirety. The defendant's state of mind can - indeed, must usually - be proved by circumstantial evidence. A lack of care or an injurious motive in making a statement is not alone proof of actual malice, but care and motive are factors to be considered. An understandable misinterpretation of ambiguous facts does not show actual malice, but inherently improbable assertions and statements made on information that is obviously dubious may show actual malice. A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is. Imagining that something may be true is not the same as belief.

[173] B.

[174] The First Amendment not only protects a public official's critics from liability for defamation absent proof that they acted with actual malice, it also requires that such proof be made by clear and convincing evidence *fn118 and that the fact finder's determinations at trial be reviewed independently on appeal. *fn119 The Supreme Court has not defined "clear and convincing evidence" for purposes of determining actual malice but has noted that in other contexts the phrase has been used to mean "evidence which `produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" *fn120 Similarly, we have held, generally as well as for the purpose of proving actual malice, that evidence is clear and convincing if it supports a firm conviction that the fact to be proved is true. *fn121 We apply that standard in this case. The Supreme Court has explained the requirement of independent appellate review of the evidence regarding actual malice as follows:

[175] The requirement of independent appellate review reiterated in New York Times Co. v. Sullivan is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges - and particularly Members of this Court - must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." *fn122

[176] The independent review required by the First Amendment is unlike the evidentiary review to which appellate courts are accustomed in that the deference to be given the fact finder's determinations is limited. Indeed, the Supreme Court has stated that "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *fn123 On questions of law we ordinarily do not defer to a lower court at all. *fn124 But the sufficiency of disputed evidence to support a finding cannot be treated as a pure question of law when there are issues of credibility. No constitutional imperative can enable appellate courts to do the impossible - make crucial credibility determinations without the benefit of seeing witnesses' demeanor. If the First Amendment precluded consideration of credibility, the defendant would almost always be a sure winner as long as he could bring himself to testify in his own

favor. His assertions as to his own state of mind, if they could not be disbelieved on appeal, would surely prevent proof of actual malice by clear and convincing evidence absent a "smoking gun" - something like a defendant's confession on the verge of making a statement that he did not believe it to be true. The First Amendment does not afford even a media defendant such protection. In the Supreme Court's words, "[w]e have not gone so far . . . as to accord the press absolute immunity in its coverage of public figures or elections." *fn125 The independent review on appeal required by the First Amendment does not forbid any deference to a fact finder's determinations; it limits that deference. How far is the difficulty.

[177] For practical direction, we have the Supreme Court's review of the evidence in Harte-Hanks. There, as we have already explained, a newspaper reported that Connaughton, a judicial candidate, had used "dirty tricks" to obtain a recorded statement from one Stephens concerning her efforts to bribe an employee in the office of Connaughton's opponent, the incumbent judge, and that he intended to present the statement to the judge privately to force him to resign. The newspaper report was based almost entirely on information provided by Stephens's sister, Thompson. A jury found that the newspaper had acted with actual malice. The Supreme Court described the independent review process as follows:

[178] In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed [in the federal courts] under the clearly-erroneous standard because the trier of fact has had the "opportunity to

observe the demeanor of the witnesses," the reviewing court must "`examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *fn126

[179] Following this procedure, the Court first determined that the jury must have disbelieved the following testimony by newspaper employees in order to find that the newspaper had acted with actual malice:

[180] · that the reason the newspaper did not interview Stephens herself was that Connaughton did not put her in contact with the newspaper;

[181] · that the reason the newspaper did not listen to the tapes of Stephens's statements was that it did not believe the tapes would provide any additional information; and

[182] · that they had believed that Thompson's allegations were substantially true. *fn127

[183] The jury could not have found this evidence credible and still have found that the newspaper had acted with actual malice. That is, had the jury believed that the newspaper

thought that Thompson's allegations were true or that no further investigation of the facts would be productive, it could not have found actual malice. These credibility determinations were not clearly erroneous. The Supreme Court then determined that the following evidence was undisputed:

[184] · Connaughton and others had denied Thompson's allegations;

[185] · the newspaper knew before it published the story that "Thompson's most serious charge - that Connaughton intended to confront the incumbent judge with the tapes to scare him into resigning and otherwise not to disclose the existence of the tapes - was not only highly improbable, but inconsistent with the fact that Connaughton had actually arranged a lie detector test for Stephens and then delivered the tapes to the police"; *fn128 and

[186] · Thompson's "hesitant, inaudible, and sometimes unresponsive and improbable tone" in her interview with the newspaper (which was taped) raised "obvious doubts about her veracity." *fn129

[187] Finally, disregarding what the jury reasonably found to be incredible and considering only what was undisputed or what the jury could have believed, the Supreme Court concluded:

[188] Accepting the jury's determination that petitioner's explanations for [its failure to interview Stephens or listen to her recorded statement] were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category. *fn130

[189] In sum, the Supreme Court explained, "[w]hen [the findings the jury must have made to reach the verdict it did] are considered alongside the undisputed evidence, the conclusion that the newspaper acted with actual malice inexorably follows." *fn131

[190] We are constrained, of course, to follow this same approach. Hence, an independent review of evidence of actual malice should begin with a determination of what evidence the jury must have found incredible. In Harte-Hanks, that evidence comprised the defendant's self-serving assertions regarding its motives and its belief in the truth of its statements. As long as the jury's credibility determinations are reasonable, that evidence is to be ignored. Next, undisputed facts should be identified. In Harte-Hanks, those facts included the denial of Thompson's allegations by Connaughton and others, and the improbability of those allegations given other facts and what the Supreme Court itself could tell from Thompson's taped interview was an obvious lack of credibility. *fn132 Finally, a determination must be made whether the undisputed evidence

along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice.

[191] This process goes a long way toward avoiding the possibility foreseen and discounted by the Supreme Court in St. Amant that, because the actual malice standard focuses on a defendant's subjective state of mind, a defendant could insulate himself from liability by his own self-serving testimony. "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." *fn133 The fact finder may choose with reason to disregard the defendant's testimony, and if it does, so must the appellate court in its independent review. That does not mean, of course, that the plaintiff can prevail merely because the jury chooses not to believe the defendant. The jury's decisions regarding credibility must be reasonable. Moreover, it remains the plaintiff's burden to adduce clear and convincing evidence of actual malice. The evidence may well not rise to that level even apart from the defendant's own testimony.

[192] With this understanding of actual malice, clear and convincing evidence, and the review we are required to undertake, we turn to the evidence of this case.

[193] C.

[194] After five days of trial, at which Bentley, Bunton, and Gates all appeared and testified extensively in person, the jury found clear and convincing evidence that Bunton had published defamatory statements about Bentley with "actual malice". The jury also found from a preponderance of the evidence that Bunton had acted with "malice". The trial court correctly defined "actual malice" and "clear and convincing evidence" for the jury as follows:

[195] A defamatory statement is made with "actual malice" if it is made with actual knowledge that it is false or with reckless disregard as to its truth or falsity.

[196] "Reckless disregard as to its truth or falsity" means a high degree of awareness of probable falsity, to an extent that the person publishing the statement entertained serious doubts as to the truth of the publication.

[197] "Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

[198] The trial court defined "malice" as follows:

[199] "Malice" means a specific intent by the defendant to cause substantial injury to the claimant, or an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. *fn134

[200] We begin our review of the evidence by determining what testimony the jury necessarily rejected in finding that Bunton acted with "actual malice" and "malice". Bunton testified at trial that whenever he had made statements about Bentley he believed them to be true at the time and that he still believed they were true. In this regard at least, the jury must have found Bunton not to be a credible witness. His testimony concerning his subjective beliefs is inconsistent with the jury's verdict. Furthermore, the jury must have disbelieved Bunton's testimony that his intent was not to embarrass or defame Bentley but only to promote good government, provide information, and correct any perception of injustice. Bunton's testimony about his intentions is likewise inconsistent with the jury's verdict. We see nothing unreasonable in the jury's decision not to believe Bunton. Thus, just as the Supreme Court in Harte-Hanks disregarded the defendant's testimony regarding its motives and beliefs, we must disregard Bunton's testimony of the same sort here.

[201] Next, we determine what facts were established

conclusively. First, Bunton knew by his own admission, at least after the June 6, 1995 "Q&A; broadcast, that Bentley denied the allegations that had been made. Bentley telephoned Bunton to discuss the allegations, but Bunton did not return the call. Instead, Bunton dared Bentley to appear on a "Q&A; show. Bentley testified that he feared he could not appear with Bunton on the show without being further unfairly abused. Also, the videotapes of "Q&A; broadcasts in evidence establish that Bunton knew that others besides Bentley believed the allegations to be false. Second, it is undisputed that Gates told Bunton that he, Gates, did not believe Bentley was corrupt. Third, Bunton does not dispute his friend's account of their conversation, in which Bunton stated that "he really couldn't get anything on . . . old Bascom Bentley, and that Bentley was "doing something", "I just don't know what it is." This occurred after Bunton had "investigated" the Curbo case and during the same time that he was accusing Bentley of being corrupt. Thus, while Bunton was telling the "Q&A; viewing audience that Bentley was corrupt in his handling of the Curbo case, he was confiding in a friend that "he really couldn't get anything on . . . old Bascom Bentley" except that he ate lunch with "that clique". Bunton also acknowledged in one broadcast that it had been "difficult to pin down" any misconduct by Bentley. Fourth, the occurrences on which Bunton based his allegations of corruption did not prove those charges, as a matter of law. Remarkably, long after Curbo's father was defeated in his bid for mayor, Bunton continued to accuse Bentley of delaying the Curbo case to pressure Curbo's father as mayor. Fifth, in broadcasts stretching over many months, Bunton repeatedly accused Bentley not only of being corrupt - by which he meant dishonest, unethical, shady, and unscrupulous - but also of not doing his job or earning his salary, going to lunch with a "clique", and being "grossly incompetent or . . . awful lazy" and a "disgrace" to his children.

[202] Finally, we consider this undisputed evidence in light of the entire record. Apart from Bunton's own self-serving assertions that are inconsistent with the jury's verdict and must therefore be ignored, the only evidence that he did not act with actual malice is that he attempted to make some investigation before airing his allegations. Specifically, Bunton stated that he obtained court records and did legal research to support his allegations. The jury could have believed this testimony and still found that he acted with actual malice, and therefore we must credit this evidence in our own assessment of the record. But we do not consider it to have much weight when there is no evidence that Bunton's investigation ever led him to contact any one of a number of other people involved in the circumstances he criticized. He did not ask the district attorney, defense counsel, or the probation officer about the delay in the Curbo case. Curbo's lawyer testified at trial that the delay benefitted his client, and the probation officer wrote the court that the case was being handled appropriately. Bunton did not ask the sheriff, the county auditor, or any member of the county commissioners court about the handling of the "hot check" and confiscated property funds, he did not call the Texas Ethics Commission about the propriety of Bentley's contributions to two county judge candidates, he did not ask a lawyer about any of the rulings for which he faulted Bentley in various cases, and he ignored the investigation into his own charges of misconduct against the district attorney. We are mindful that a failure to investigate the facts is not, by itself, any evidence of actual malice, but what is so striking about the record in this case is the complete absence of any evidence that a single soul, besides Gates, ever concurred in Bunton's accusations of misconduct against Bentley. All those who could have shown Bunton that his charges were wrong Bunton deliberately ignored. Even after Bunton encouraged "Q&A; viewers to report any misconduct by Bentley, and went so far as to instruct on how that could be done anonymously, the

record is silent as to whether anyone ever responded.

[203] From our thorough review of the record and our detailed recitation of the evidence, whether Bunton's actual malice has been proved by clear and convincing evidence is not, we think, a close question. We are convinced, by no small margin, that Bunton never made his allegations against Bentley in good faith, that he expressed doubt to a friend that there was any basis for the charges he was making, and that he deliberately ignored people who could have answered all of his questions. The fact that Bunton dared his victims to appear on his show but made no attempt to hear them privately strongly supports our conclusion.

[204] Moreover, while a defendant's ill will toward a plaintiff does not equate to, and must not be confused with, actual malice, such animus may suggest actual malice. *fn135 Bunton hounded Bentley relentlessly and ruthlessly for months, despite the threat of suit and at least one entreaty from Gates, asserting that Bentley was not earning his salary, that he was part of a clique of local leaders who lunched together, that he should resign, that he had been "very, very slick" to avoid being caught, and that he was "either . . . just grossly incompetent, or . . . awful lazy". Bunton told Bentley's sister that Bentley was corrupt and stated that Bentley had disgraced his own children. Bunton even coached callers on how to register complaints about Bentley anonymously. This evidence that Bunton carried on a personal vendetta against Bentley without regard for the truth of his allegations also indicates actual malice.

[205] Accordingly, we conclude that the evidence that Bunton acted with actual malice in defaming Bentley was clear and convincing. Chief Justice Phillips's contrary conclusion is, in our view, the product of faulty analysis that granulates the evidence tending to show actual malice but amalgamates all of the contrary evidence. Because no single piece of evidence proves actual malice, and there is some evidence to the contrary, he concludes that Bentley has not met his burden. We think, however, that when the evidence is viewed as a whole, as it must be, it convincingly shows Bunton's actual malice. It is simply unfair for Chief Justice Phillips to dismiss what he describes as Bunton's "protracted verbal barrage" *fn136 of "defamatory falsehoods" *fn137 against Bentley as "ill manners, legal mistakes, and ineffective investigation." *fn138 Nor were Bunton's erroneous charges merely due to a lack of legal training, as Chief Justice Phillips suggests; on the contrary, there was unchallenged testimony at trial that no reasonable person could have believed Bunton's accusations.

[206] D.

[207] Unlike Bunton, Gates testified that he never believed Bentley was corrupt. Gates never used the word "corrupt" in discussing Bentley's conduct, but there is evidence to support the jury's finding that he agreed with Bunton's allegations on two "Q&A; broadcasts. If he knew he was communicating a falsehood, then there can be no question that he acted with actual malice because he himself acknowledges that he did not believe the allegations of corruption. But a defendant cannot be said to have made a statement with actual malice if he did not know or have reckless disregard for whether the statement communicated a falsehood. In Turner v.

KTRK Television, Inc., we held that while a message may be false and defamatory as a whole, even though no single statement is false, proof of actual malice requires clear and convincing evidence that the defendant "knew or strongly suspected that the publication as a whole could present a false and defamatory impression . . . ." *fn139 Here, too, we think that the actual malice standard focuses on the defendant's state of mind regarding the import of the statements actually made. If in response to the statement that P is a felon, D says, "Yes, indeed," knowing full well that P is not a felon, the evidence is clear and convincing that D has acted with actual malice. Even though his own words are neutral in isolation, in context he can hardly deny that he knew he was communicating agreement with what he knew was false. But had D replied only, "Do tell," the evidence of actual malice is nil. D could quite credibly argue that his response was but a polite acknowledgment of the statement and that he had no reasonable idea he would be taken to have endorsed it. Thus, with respect to Gates, we think that the actual malice standard requires clear and convincing evidence that on one of the two occasions in question, either he knew that what he said communicated that Bentley was corrupt, or else he had reckless disregard for whether he had communicated that message.

[208] We have already described the two occasions, both of which occurred on "Q&A; broadcasts, a videotape of which was before the jury. In one, Bunton had told a caller that the district attorney, not Bentley, was the most corrupt official in Anderson County. As Gates started to correct Bunton, Bunton interrupted and corrected himself, saying "Bascom Bentley's number one." "Yeah," Gates replied. At trial, Gates testified that he thought "yeah" "was a spontaneous reaction more than anything". On the other occasion, Bunton listed two situations showing that Bentley was corrupt. Gates then named two other

situations and added, "and there's some others besides." Gates did not offer an explanation of this occasion at trial, but he now says, in argument on appeal, that he was merely helping Bunton list the situations Bunton had himself mentioned in the past. Gates did testify that he bore Bentley no ill will, and that he had told Bunton that he did not believe Bentley was corrupt.

[209] The jury found that Gates's remarks communicated his agreement with Bunton's allegations that Bentley was corrupt, and that in so doing Gates acted with "actual malice" and "malice", as those words were defined by the trial court in the charge (which we have quoted above). In reviewing the evidence following the procedure set out in Harte-Hanks, we must first disregard Gates's testimony that "yeah" was only a spontaneous reaction, that he ever told Bunton that Bentley was not corrupt, and that he bore Bentley no ill will; all of this testimony is inconsistent with the verdict and could not have been believed by the jury. The jury reasonably refused to believe Gates. Thus, we must consider the effect of Gates's statements on their face, without benefit of Gates's explanations, in light of the undisputed evidence and the remainder of the record.

[210] Two facts are undisputed. One is that Gates never believed Bentley was corrupt. Gates admits this himself. The other is that Gates participated with Bunton on numerous "Q&A; programs over a period of many months, listening to Bunton repeatedly accuse Bentley of being corrupt, and never took issue with one of Bunton's accusations. Indeed, on one occasion Gates helped Bunton list examples of Bentley's corrupt conduct. In addition, except for Gates's testimony, which we must disregard, the record is silent on whether Gates ever

disagreed with Bunton that Bentley was corrupt. Gates's counsel asked Bunton whether Gates "disagree[d] with you on occasion when discussing Judge Bentley on the air." Bunton answered: "Colonel Gates and I have had a lot of disagreements, not about the facts, but a disagreement in direction, in technique." Although Gates did not dispute that he told Bentley he would ask Bunton to stop calling Bentley corrupt, Gates did not adduce any evidence to show that he did so.

[211] Were the two "Q&A; shows in which Gates chimed in during Bunton's allegations isolated instances, we certainly could not find clear and convincing evidence in this record that Gates either knew or had reckless disregard for whether he was communicating that Bentley was corrupt, something he knew was false. But the two shows cannot be viewed in isolation. Gates knew what Bunton's allegations were. He had sat next to Bunton as Bunton repeated them on many occasions. Still, Gates remained silent all but twice, and both times his reaction was ambiguous. From the videotapes of those two occasions, we cannot say, even in the context of Bunton's ongoing verbal assaults against Bentley in Gates's presence, that Gates knew or had reckless disregard for whether he was himself communicating a falsehood.

[212] The jury's finding of Gates's ill will and spite toward Bentley cannot prove actual malice by itself and does not alter our conclusion. Although the issue is a close one, we hold that the evidence of Gates's actual malice was not clear and convincing.

[213] VI.

[214] Regarding damages, Bunton argues that the evidence does not support any award of actual or punitive damages to Bentley, and alternatively, that the amounts of actual and punitive damages determined by the jury are without support in the evidence and exceed First Amendment limitations.

[215] The first argument need not long detain us. Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish. *fn140 Bunton does not contest that if, as we have now held, Bunton's statements were false statements of fact and not merely expressions of opinion, then they were defamatory per se, as the trial court ruled. As a matter of law then, Bentley was entitled to recover actual damages for injury to his reputation and for mental anguish. Moreover, from the evidence we have summarized above, the jury could readily have found that Bentley's reputation was in fact injured and that he in fact suffered mental anguish on account of the defendants' conduct. Also, because the defendants acted with actual malice, Bentley is entitled to punitive damages without proving that the defendants were personally vindictive toward him, *fn141 although again, the evidence supports the jury's finding that in fact Gates and Bunton acted "with specific intent . . . to cause substantial injury", as found by the jury.

[216] Bunton's second argument - that the amounts of damages awarded are not supported by the evidence or permitted by the First Amendment -requires more analysis.

[217] A.

[218] The jury found that Bunton caused Bentley $7 million in mental anguish damages and $150,000 in damages to his character and reputation. Non-economic damages like these cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment. But the necessity that a jury have some latitude in awarding such damages does not, of course, give it carte blanche to do whatever it will, and this is especially true in defamation actions brought by public officials.

[219] In Gertz v. Robert Welch, Inc., the United States Supreme Court held that state law may set a lesser standard of culpability than actual malice for holding a media defendant liable for defamation of a private plaintiff, but under any lesser standard the plaintiff can recover "only such damages as are sufficient to compensate him for actual injury." *fn142 Noting that damages may be presumed without proof of injury in certain defamation cases, such as those involving defamation per se, the Court expressed concern that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *fn143 The Court expressed the same concern regarding punitive damages.

*fn144

[220] Although the Court did not consider whether limitations should be placed on damage awards when a defendant is shown to have acted with actual malice, we think that similar concerns are raised. Damage awards left largely to a jury's discretion threaten too great an inhibition of speech protected by the First Amendment. This case is a prime example. The jury's award of $7 million in mental anguish damages strongly suggests its disapprobation of Bunton's conduct more than a fair assessment of Bentley's injury. The possibility that a jury may exercise such broad discretion in determining the amount to be awarded unrestrained by meaningful appellate review poses a real threat to all members of the media.

[221] Accordingly, we conclude that the First Amendment requires appellate review of amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant. Exercising that review in this case, we conclude that while the record supports Bentley's recovery of some amount of mental anguish damages, it does not support the amount of those damages found by the jury.

[222] B.

[223] Moreover, under our common law the latitude necessarily accorded a jury in assessing non-economic damages does not insulate its verdict from appellate review for evidentiary support. Just as a jury's prerogative of assessing the credibility of evidence does not authorize it to find liability when there is no supporting evidence or no liability in the face of unimpeachable evidence, so a large amount of mental anguish damages cannot survive appellate review if there is no evidence to support it, or a small amount of damages when the evidence of larger damages is conclusive. The jury is bound by the evidence in awarding damages, just as it is bound by the law.

[224] Our law distinguishes between appellate review for no evidence and insufficient evidence. The courts of appeals are authorized to determine whether damage awards are supported by insufficient evidence -that is, whether they are excessive or unreasonable. We have rejected the view that that authority displaces their obligation, and ours, to determine whether there is any evidence at all of the amount of damages determined by the jury. In Saenz v. Fidelity & Guaranty Insurance Underwriters, we explained:

[225] Not only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded. We disagree with the court of appeals that "[t]ranslating mental anguish into dollars is necessarily an arbitrary process for which the jury is given no guidelines." [Fidelity & Guaranty Insurance Underwriters v. Saenz, 865 S.W.2d 103, 114 (Tex. App.-Corpus Christi 1993)]. While the impossibility of any exact evaluation of mental anguish requires that juries be given a measure of discretion in

finding damages, that discretion is limited. Juries cannot simply pick a number and put it in the blank. They must find an amount that, in the standard language of the jury charge, "would fairly and reasonably compensate" for the loss. Compensation can only be for mental anguish that causes "substantial disruption in . . . daily routine" or "a high degree of mental pain and distress". Parkway [v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995)]. There must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding. Reasonable compensation is no easier to determine than reasonable behavior - often it may be harder - but the law requires factfinders to determine both. And the law requires appellate courts to conduct a meaningful evidentiary review of those determinations. One court of appeals has suggested the contrary. See State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 601 (Tex. App.-El Paso 1991, writ denied); Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.--El Paso 1989, writ denied); Brown v. Robinson, 747 S.W.2d 24, 26 (Tex. App.-El Paso 1988, no writ). We disapprove that language in those cases. *fn145

[226] We concluded in Saenz that there was no evidence to support the $250,000 damages for mental anguish awarded by the jury.

[227] This case is far clearer than Saenz. The record leaves no doubt that Bentley suffered mental anguish as a result of Bunton's and Gates's statements. Bentley testified that the ordeal had cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his

children at school. The experience, he said, was the worst of his life. Friends testified that he had been depressed, that his honor and integrity had been impugned, that his family had suffered, too, adding to his own distress, and that he would never be the same. Much of Bentley's anxiety was caused by Bunton's relentlessness in accusing him of corruption. But all of this is no evidence that Bentley suffered mental anguish damages in the amount of $7 million, more than forty times the amount awarded him for damage to his reputation. The amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support.

[228] The other amounts of actual damages found by the jury are well within a range that the evidence supports. We do not consider whether the awards were unreasonable; that issue was for the lower courts. We conclude only that no evidence permitted the jury to make the findings it did.

[229] C.

[230] Gates and Bunton argue that the amounts of punitive damages determined by the jury were excessive by constitutional standards, but they clearly were not. Punitive damages were a fraction of the actual damages found by the jury. Even if mental anguish damages were reduced, as we conclude they must be, there is evidence to support the punitive damages set by the jury. However, because we conclude that there is no evidence to support part of the actual damage award, punitive damages must be reassessed as well. *fn146

[231] VII.

[232] We come finally to what our judgment should be be, given the division of the Court. Seven of the eight Members of the Court participating in the decision of this case agree that the judgment of the court of appeals that Bentley take nothing from Gates should be affirmed. Only Justice Baker disagrees. Judgment will be rendered accordingly. Regarding Bunton, the Court is more deeply divided. Justice Baker would render judgment against Bunton and Gates, jointly and severally, for all the damages found by the jury. Three Members of the Court - Chief Justice Phillips, Justice Enoch, and Justice Hankinson - would render judgment that Bentley take nothing from Bunton or Gates. The other four Members of the Court - Justice Owen, Justice Jefferson, Justice Rodriguez, and I - would remand the case to the court of appeals to reconsider the excessiveness of the jury's award of mental anguish damages against Bunton in view of this opinion. It may be that Bentley's action against him must be retried, but the court of appeals is free to suggest a remittitur.

[233] The Court has faced similar divisions before. In Diamond Shamrock Refining and Marketing Co. v. Mendez, *fn147 three Justices would have rendered judgment for the plaintiff, three would have rendered judgment for the defendant, and three would have remanded the case for a new trial. A majority of the Court nevertheless joined in a judgment remanding the case as being the judgment most consistent with their respective views. Also, in National County Mutual Fire Insurance Co. v. Johnson, *fn148 four Justices concluded that

an insurance policy provision was valid, four concluded that it was entirely invalid, and one concluded that the provision was only partially invalid. A majority of the Court joined in a judgment invalidating the provision in part. Likewise, today a majority of the Court - all but Justice Baker - join in the judgment remanding this cause to the court of appeals for further proceedings, although the reasons for the remand are advanced by only four justices.

[234] Judgment accordingly.

[235] Chief Justice Phillips, joined by Justice Enoch and Justice Hankinson, concurring in part and dissenting in part.

[236] I.

[237] A.

[238] The United States Supreme Court has long recognized "the privilege for the citizen-critic of government," declaring: "It is as much his duty to criticize as it is the official's duty to administer." New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964). The Constitution therefore protects any speech about public officials and public figures unless it is both 1) provably false, Milkovich v. Lorain Journal Co., 497 U.S. 1,

19 (1990), and 2) made with either knowledge of its falsity, New York Times, 376 U.S. at 279-80, or serious doubt as to its truth, St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Obviously, this high degree of protection "exacts a correspondingly high price from the victims of defamatory falsehood" who may be "unable to surmount the barrier" of that privilege. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[239] "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great." New York Times, 376 U.S. at 281 (quoting with approval Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908).

[240] Undoubtedly, Joe Ed Bunton subjected Judge Bascom Bentley III to a protracted verbal barrage. I agree with the Court that as a matter of law at least some of these statements were defamatory falsehoods. But I also believe that Bentley failed to prove by clear and convincing evidence that Bunton made his statements with actual malice, as that term is used in defamation jurisprudence.

[241] In my own independent appellate review, as required in Bose Corp. v. Consumers Union of United States,

Inc., 466 U.S. 485, 511 (1984), I cannot find clear and convincing evidence that Bunton either knew that his statements were false or entertained serious doubts about their truth. The Court's opinion is a judicial miscellany of Bunton's ill manners, legal mistakes, and ineffective investigation, from which a conclusion is concocted that Bunton did not believe his allegations that Bentley was corrupt. Taken separately or together, the incidents the Court recites establish only objective unreasonableness, not the subjective state-of-mind required to prove actual malice. I would reverse the court of appeals' judgment and render judgment that Bentley take nothing against Bunton.

[242] B.

[243] Unlike Bunton's words, Colonel Jackie Gates' public statements on the Q & A cable-access call-in show were not false and defamatory on their face. However, a reasonable listener could have understood two of Gates' comments to express a defamatory meaning - agreement that Judge Bascom Bentley was corrupt - due to their juxtaposition with Joe Ed Bunton's words.

[244] To prove public-official defamation when the defendant's words could be understood as defamatory or as not, the plaintiff must prove by clear and convincing evidence that the defendant either knew or strongly suspected at the time he spoke that his words would carry a defamatory meaning to the ordinary listener. See Turner v. KTRK Television, Inc., 38 S.W.3d 103, 120 (Tex. 2000); see also

Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions."). If this showing is made, the public-official plaintiff must also prove by clear and convincing evidence that the defendant either knew the defamatory meaning was false, New York Times, 376 U.S. at 279-80, or seriously doubted its truth, St. Amant, 390 U.S. at 731. I agree that Bentley has failed to carry his burden as to Gates.

[245] II.

[246] The United States Supreme Court tailored the actual malice test to discourage the self-censorship that libel law might otherwise impose on political speech. In New York Times, the Times had published a defamatory advertisement containing significant factual errors. New York Times, 376 U.S. at 256-59. The Times possessed the correct information in its own news files but failed to consult them. Id. at 287. This evidence, the Court held, "support[ed] at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." Id. at 288. This new "actual malice" standard was entirely distinct from common law malice, focusing on knowledge rather than motive.

[247] The New York Times Court believed the Constitution required the actual malice test in order to protect free debate and preserve political liberty. Quoting from Speiser

v. Randall, 357 U.S. 513, 526 (1958), the Court observed:

[248] A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments virtually unlimited in amount - leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. New York Times, 376 U.S. at 279.

[249] The Court rejected the notions that either the reputations of public officials or the desirability of accurate information were sufficiently important to justify traditional defamation standards. Thus, the Court observed:

[250] Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice . . . [J]udges are to be treated as men of fortitude, able to thrive in a hardy climate. New York Times, 376 U.S. at 272-73 (citations omitted).

[251] Truthful speech has value. False speech mistakenly believed to be true, while valueless, should be protected to avoid self-censorship of truthful speech. Known falsehood is neither valuable nor necessary to preserve free debate and thus has no constitutional protection.

[252] III.

[253] A.

[254] To recover for defamation, the public-official plaintiff must prove by clear and convincing evidence that the defendant spoke with actual malice. Actual malice is a legal term of art, wholly distinct from the more venerable common law malice. The actual malice inquiry is subjective, focused on the defendant's actual state of mind regarding truth, not the reasonableness of or the reasons for his speech. Thus, the plaintiff must prove that when the defendant spoke he either knew his statements were false or had reckless disregard for their truth. New York Times, 376 U.S. at 280. Reckless disregard is also a subjective standard that is not synonymous with common law recklessness. For reckless disregard to exist, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant, 390 U.S. at 731. Or put another way, the defendant must have made his false and defamatory allegations with a "high degree of awareness of their probable falsity." Garrison, 379 U.S. at 74.

[255] When reviewing public-official defamation cases for clear and convincing evidence of actual malice, we defer to the jury only on credibility issues. After determining what testimony the jury must have disbelieved to reach its verdict, we review those findings for clear error. Harte-Hanks Communications, Inc., v. Connaughton, 491 U.S. 657, 688 (1989). Otherwise, the New York Times standard mandates a searching independent review of all factual evidence. Id.; Bose Corp., 466 U.S. at 511; New York Times, 376 U.S. at 285. This federal constitutional standard takes precedence over the limitations on our factual review established in the Texas Constitution. Turner, 38 S.W.3d at 120. *fn149

[256] B.

[257] In finding clear and convincing evidence of actual malice, this Court offers several facts that "were established conclusively" to support its conviction "by no small margin," that Bunton acted with actual malice. ___S.W.3d at ___. None of these facts, taken singly or together, come close to proving the Court's case that Bunton doubted the truth of his allegations. That Bunton dared Bentley on television to appear live on Q & A rather than returning a private telephone call may establish a breach of etiquette, but it is not evidence of a public figure defamation. *fn150 That Bunton knew that others disagreed with his allegations is also no evidence of actual malice. *fn151 That Bunton confessed uncertainty to a friend that "[Bentley's] doing something; I just don't know what it is," and that he acknowledged on a broadcast that Bentley was "difficult to pin down," suggests that he firmly believed Bentley

was, in fact, doing something wrong. *fn152 Far from showing by clear and convincing evidence that he was consciously indifferent to the truth, these remarks indicate that he was trying, in his own limited way, to bring to his viewing audience the truth. The Court also points to other harsh, though nondefamatory, epithets that Bunton hurled at Bentley in the course of his broadcasts. But even Bentley does not claim that accusations that he disgraced his children, was lazy, or lunched with a clique are any proof that Bunton did not really believe that Bentley was corrupt.

[258] Most disturbingly, the Court finds clear and convincing evidence of actual malice because "the occurrences on which Bunton based his allegations of corruption did not prove those charges, as a matter of law." Id. at ___. I agree that Bentley conclusively established that at least some of Bunton's charges were false as a matter of law. But I strenuously disagree that the falsity of some or all of Bunton's charges proves that Bunton knew they were false at the time he made them. See Bose Corp., 466 U.S. at 491 n.6, 512-13 (holding that trial court erred when it reasoned that speaker must have known his statements were false at the time he made them because they were, in fact, clearly false).

[259] Moreover, the Court points to evidence of personal animus to suggest that Bunton acted with actual malice. Even if there were such evidence, it would not satisfy the New York Times standard. See Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (noting actual malice cannot be based merely on defendant's "`bad or corrupt motive,'" "`personal spite, ill will or a desire to injure plaintiff'"). But, in fact, there is not a shred of evidence in the record to suggest that Bunton had a

pre-existing feud with Bentley, or that his desire to harm Bentley's career came from any source except his mistaken belief that Bentley was corrupt. Thus, the Court uses Bunton's erroneous statements to prove that he acted with ill will, then points to that ill will to establish motive for his false statements. The Court substitutes circular reasoning for constitutional analysis.

[260] C.

[261] Most of all, the Court relies on the purposeful-avoidance doctrine of Harte-Hanks Communications, Inc., 491 U.S. at 692-93. Harte-Hanks was a narrow holding, grounded in facts more egregious than those presented here. Before publishing a story attacking the integrity of a candidate for public office, the defendant newspaper was offered access to a tape of a conversation that would have shown whether the story was true or false. Id. at 683. The paper's reporters deliberately chose not to listen to it. Id. The Supreme Court concluded that the newspaper's purposeful avoidance of the truth was sufficient to prove that it in fact had serious doubts about the truth of its story. Id. at 683-84, 692.

[262] There is no evidence here that Bunton knew of and had access to a specific piece of evidence that he knew would prove or disprove his allegations, yet consciously chose not to learn of its contents. The Court points out that Bunton did not call either the district attorney or the defense lawyer for further information in the Curbo case. ___S.W.3d at ___. But unlike the newspaper reporters in Harte-Hanks, who inexplicably refused

to review independent documentary evidence, Bunton repeatedly went to the courthouse and reviewed the official public documents on the Curbo case. There is no evidence that Bunton knew of the off-the-record agreement between the attorneys and the probation officer, and thus no evidence that he had any reason to suspect that he needed to contact them in order to obtain additional, dispositive information that could not be found in the public records.

[263] The Court further argues that Bunton deliberately avoided the truth because he did not contact the county commissioners' court about the hot check and confiscated property funds, ___S.W.3d at ___. But Bentley himself testified about a Q & A letter to the county commissioners' court requesting information about the funds. Bentley was further questioned about the letter's complaint that the district attorney had responded to Q & A's freedom of information request by notifying Q & A that it would have to pay a $45,000 copying bill before a representative could view the fund records.

[264] In addition, the Court asserts that Bunton "ignored the investigation into his own charges of misconduct against the district attorney." Id. at ___. The outside prosecutor, Garner, who investigated Bunton's complaints did recommend that no action be taken against the district attorney. But she also testified at trial that the district attorney had indeed failed to deposit the funds properly, and that his "mistakes" could be considered "official misconduct."

[265] Although the Court claims that Bunton "deliberately ignored" "all those who could have shown Bunton that his charges were wrong," id. at ___, Bunton chose to publish his allegations on Q & A, a live call-in show that neither screened nor time-delayed its viewer calls and afforded him no opportunity to avoid or suppress the views of any person who chose to publicly contradict his comments. Bentley himself testified at trial that he refused to appear on Q & A and deliberately chose to respond to Bunton only through this lawsuit, rather than by exercising his own First Amendment right to confront and correct Bunton before the public. See Gertz, 418 U.S. at 344 ("The first remedy of any victim of defamation is self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significant[] . . . access to the channels of effective communication.").

[266] Harte-Hanks did not base its actual malice finding on the reporters' general failure to investigate all possible sources of information, but on their conscious avoidance of specific evidence that would conclusively establish the truth or falsity of their story. Bunton's actions are at most the failure to investigate held not to be actual malice in St. Amant, not the purposeful avoidance held to establish subjective doubt in Harte-Hanks.

[267] The actual malice test is not a cookbook, in which three teaspoons of objective unreasonableness can automatically substitute for one teaspoon of subjective doubt. In St. Amant, the Court held that the circumstantial evidence of objective unreasonableness proved only that -

unreasonableness, not subjective doubt. 390 U.S. at 731. The Court reached this conclusion despite evidence that the defendant had no personal knowledge of the truth or falsity of his comments and had completely failed to conduct any investigation of his allegations before publishing them. Id. at 730-33. By contrast, the circumstantial evidence that reporters purposefully avoided dispositive evidence in Harte-Hanks tended to show, not only objectively unreasonable behavior, but subjective doubt. The tendency to confuse these cases and use objective evidence as an automatic substitute for subjective doubt, rather than a possible indicator of subjective doubt, has prompted the Supreme Court to admonish: "[C]courts must be careful not to place too much reliance on such factors." Harte-Hanks, 491 U.S. at 668. "The standard is a subjective one - there must be sufficient evidence to permit the conclusion that the defendant actually had a `high degree of awareness of . . . probable falsity.'" Id. at 688 (quoting Garrison, 379 U.S. at 74).

[268] In the end, circumstantial evidence of falsity must prove, by clear and convincing evidence, not merely that the defendant's actions were objectively unreasonable or that a prudent man would not have published his allegations, but that he in fact knew his statements were false or seriously doubted that they were true. St. Amant, 390 U.S. at 731 (quoted in Harte-Hanks, 491 U.S. at 667). And circumstantial evidence of ill will must prove not that the defendant intended to harm the plaintiff and perhaps did not investigate as thoroughly as he might have, but that he intended to harm the plaintiff by publishing known or probable lies. Garrison, 379 U.S. at 74. Only such "calculated falsehood" is actual malice. Id. at 75.

[269] D.

[270] Looking at the record as a whole, I find much evidence, not dependent on Bunton's credibility at trial, suggesting that he believed his charges were true and that he did not recklessly disregard the truth or falsity of his charges. *fn153 Bunton's specific allegations were made after extensive, if not very effective, research. He filed open records requests with local officials, then filed follow-up complaints when some of those requests were denied. He made numerous trips to the courthouse to read and copy public records. Often, he went on the day of his Q & A broadcast to obtain the most current information, displaying his latest photocopies in front of the television camera as he spoke. He publicly dared Bentley to either telephone Q & A or appear live on the show to refute the charges. He told callers they were "welcome" to come on the show and demonstrate that his allegations were untrue and invited them to review the facts for themselves, expressing his certainty that they could come to only one conclusion about Bentley - that he was corrupt. When Bentley threatened to sue for defamation, Bunton responded on air that he would welcome a lawsuit, because Bentley would have to testify under oath. Bunton told a friend, Tucker Farris, that he believed Bentley's clique was responsible for injustices in local government, and that Bunton wanted to bring to the surface "anything that was not right with the system." On the air, he insisted, "You can't sue anybody for slander when they're telling the truth. And this is the truth, and there is no libel or slander in this." Bunton knew that only truthful charges were absolutely protected from suit and was trying to meet that standard. On one show, Bunton described Bentley as "one of the hardest people for Q & A to finally get some things that we could really dig our teeth in and were confident to go on the air on and go after him on because he is very, very slick." Far

from making unfounded or untruthful accusations, this statement suggests that Bunton did not air his accusations until he had confidence in them.

[271] At trial, Bentley's lawyers would not allow Bunton to outline for the jury Bentley's obligations under the Code of Judicial Conduct because he had no legal training and was "not qualified" to give opinions on such "highly complicated" legal issues. Yet this Court finds clear and convincing evidence of actual malice because Bunton misunderstood Bentley's obligations under the laws of the state and that Code.

[272] Most, though not all, of the underlying facts Bunton used to support his accusations were accurate. It was only Bunton's conclusions that were faulty. To a layperson, it might well be plausible that dormant case dockets, individuals erroneously thrown back into jail after finishing their sentences, campaign contributions to candidates for judicial positions Bentley supervised, and appellate court reversals would suggest corruption. Bunton was also correct when he complained that Bentley did not order an audit despite receiving monthly reports revealing that a county official over whom he had supervisory authority had not deposited public funds as required by law, and that Bentley took no action after learning that a local sheriff had refused to exercise an arrest warrant. However clear it may be to attorneys that none of these actions prove corrupt or criminal behavior, surely there is not clear and convincing evidence that no member of the public could genuinely suspect corruption.

[273] To insist that ordinary citizens understand the legal system's intricacies (perhaps by consulting a lawyer, as the Court helpfully suggests, ___ S.W.3d at ___) before they comment on a judge's performance is an unconstitutional restriction on free speech. A misunderstanding that no rational and responsible lawyer could make may still be made by laypeople. See Time, Inc. v. Pape, 401 U.S. 289-92 (1971) (misrepresenting allegations contained in a complaint as true facts was not actual malice); Turner, 38 S.W.3d at 121 (juxtaposing true facts to create defamatory false impression was not actual malice because non-lawyer may not have understood legal significance of chosen words and omitted information). As the Supreme Court explained:

[274] And since " . . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the `breathing space' that they `need . . . to survive,' . . ." only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. Garrison, 379 U.S. at 74-75 (1964) (quoting New York Times, 376 U.S. at 271-72).

[275] IV.

[276] A.

[277] I agree with the Court that Judge Bascom Bentley has failed to prove by clear and convincing evidence that Colonel Jackie Gates acted with actual malice. Gates' words were not defamatory on their face, and could only be understood as defamatory due to their juxtaposition with Bunton's words, which the trial court held were defamatory as a matter of law. Gates' words carry two possible meanings, one innocent, which Gates claims, and one defamatory, which Bentley advocates.

[278] To find actual malice when the defamation is not evident on the face of the comments but a reasonable listener could have understood the words to be defamatory, our independent Bose review requires the public- official plaintiff to prove by clear and convincing evidence not only that the speaker had at least serious doubts of the truth of that defamatory interpretation, see St. Amant, 390 U.S. at 731, but also that the speaker knew or strongly suspected that his words would convey that defamatory meaning. See Turner, 38 S.W.3d at 120; see also Garrison, 379 U.S. at 75 ("[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions."). As one scholar explains:

[279] [W]hether the speaker means to say something true and it is understood to mean something false, or to say something benign and it is understood to mean something defamatory, innocent or negligent misstatement is fully protected by the "actual malice" standard. It is for this reason

that implications perceived in a statement but not intended by the speaker cannot be actionable in public official or public figure cases. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 5.5.1.2 (3d ed. 2002) (citing Turner, 38 S.W.3d at 120).

[280] Under common law, statements are judged by the meaning reasonably understood by listeners. Under the First Amendment, statements must be judged by what the publisher intended them to mean. See id. § 5.5.1.2.

[281] Several notable cases have required the same showing. In Saenz v. Playboy Enters., Inc., an article in the defendant magazine said: And the U.S. adviser who had been Mitrione's predecessor for four years, whose office was on the first floor of the Montevideo jefatura, where torture reportedly took place and the screams of the victims reverberated, who by his own account had intimate and influential relations with the Uruguayan police, was Adolph Saenz.

[282] From Montevideo, allegations of torture by his police clients would follow Saenz through subsequent assignments. . . . 841 F.2d 1309, 1312 (7th Cir. 1988).

[283] According to the court, this could have meant either that Saenz was complicit with torture, which was defamatory, or that he was in a position to know about it, which was not. Id. at 1315.

[284] The court held that to prove actual malice, a public figure plaintiff must prove not only that the defendant had at least serious doubts about the truth of his statements, but also that "where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material." Id. at 1318. If anything, evidence that no reasonable person could have concluded that Saenz was involved in torture bolsters the defendants' claim that they did not intend to accuse him. See id. at 1318-19.

[285] In Newton v. Nat'l Broad. Co., 930 F.2d 662, 667 (9th Cir. 1990), which we cited in Turner, the district court had found actual malice where a broadcast created the impression that Newton, a famous entertainer, held a hidden ownership in a Las Vegas hotel for Mafia sources and deceived state gaming authorities under oath. In merely limiting but not completely overturning a large jury verdict for Newton, the district court concluded that even if NBC had left a defamatory impression unintentionally, it "should have foreseen" that viewers could perceive the defamatory impression. Newton, 930 F.2d at 680. Therefore, NBC showed a reckless disregard for the truth.

[286] The Ninth Circuit reversed. "Negligence, weighed against an objective standard like the one used by the district court, can never give rise to liability in a public figure defamation case" under New York Times. Id. "Such an approach eviscerates the First Amendment protections established by New York Times. It would permit liability to be imposed not

only for what was not said but also for what was not intended to be said." Id. at 681.

[287] In Fong v. Merena, 655 P.2d 875, 876 (Haw. 1982), Merena displayed a sign on his lawn and around town which read:

[288] Ushijima/Fong

[289] Voted "Yes"

[290] Pension/Pay Raise

[291] Merena claimed that the sign meant that Ushijima had voted for the pension bill and Fong had voted for the pay raise legislation. Id. at 877. He did not realize, he said, that readers might think both politicians had voted for both bills. Id. Fong argued that Merena knew that he had not voted for the pension bill, and that the sign could reasonably be interpreted to say that he had. The Hawaii Supreme Court, reversing a lower court judgment, held:

[292] It has not been clearly and convincingly shown that

in making the publication, Merena believed it was false. On the contrary, he claims that it was accurate, and depending on how one views the sign there is merit to his contention. The fact that it could have been construed otherwise is not, we think, sufficient to prove that Merena acted with actual malice. Id.

[293] B.

[294] Bentley argues that Gates made two on-air defamatory statements. In the first, Gates interrupted Bunton's exchange with a caller, who was unsuccessfully trying to point out to Bunton that he had just called another local official, not Bentley, the most corrupt local government official. When Bunton corrected himself and clarified that Bentley was in fact the most corrupt, Gates said, "yeah." In the second exchange, Bunton was listing the reasons he believed Bentley was corrupt, and Gates added two items to Bunton's list and noted there were others.

[295] I conclude that both of these statements are genuinely ambiguous; it is possible that Gates intended to express agreement with Bunton's defamatory comments, but it is also plausible that he did not. As I have discussed, Bentley bears the burden to show by clear and convincing evidence that Gates knew or strongly suspected that listeners would interpret his statements as agreement with the substance of Bunton's comments.

[296] Bentley has failed to meet this burden. He has not even argued, let alone proved, that Gates intended his comments to convey an accusation that Bentley was corrupt. Here, as in Saenz, Bentley has tried to prove only that a reasonable listener could have understood Gates' words to convey a defamatory meaning that Gates could not reasonably have believed, see Saenz, 841 F.2d at 1318-19, in part because Gates admitted that he had no personal knowledge of Bentley's corruption. See St. Amant, 390 U.S. at 730, 733 (lack of personal knowledge of basis for defamatory statement is not evidence of actual malice). That is no evidence of Gates' subjective intent. The First Amendment does not permit a defendant to be liable for a defamatory meaning he did not either know or strongly suspect his words would convey. I conclude that Bentley has not carried his burden to clearly and convincingly prove actual malice against Gates.

[297] V.

[298] New York Times and its progeny are designed to encourage valuable public debate by protecting false, defamatory speech that is made in error. Bentley has not clearly and convincingly proved that Bunton published the type of calculated falsehood about a public official that is beyond the protection of the First Amendment. Therefore, I believe that Bentley is just the type of public official who must, so that vigorous public debate can be guaranteed, forfeit the civil recovery a private citizen might obtain if similarly defamed. While the Court reaches the correct result in rendering judgment for Gates, it errs in failing to render judgment for Bunton as well.

[299] Thomas R. Phillips, Chief Justice

[300] Justice Baker filed a dissenting opinion.

[301] I agree with the Court's conclusion that there is clear and convincing evidence that Bunton acted with actual malice in defaming Bentley. However, I disagree with the Court's conclusion that such evidence does not exist to support Gates's liability. And, contrary to the court of appeals' determination, I would hold that Gates and Bunton are jointly and severally liable based on the jury's finding that they conspired to defame Bentley. Finally, I am appalled at the Court's remarkable holding about the mental anguish damages award. Specifically, the Court improperly conducts a factual sufficiency review on mental anguish damages based on a tenuous and entirely incorrect conclusion that the United States Supreme Court requires such a review. Because I, for one, cannot ignore our well-established legal principles that (1) impose joint and several liability on co-conspirators, and (2) preclude this Court from conducting factual sufficiency reviews and issuing advisory opinions, I dissent.

[302] I. GATES'S LIABILITY: DEFAMATION, CONSPIRACY, AND JOINT AND SEVERAL LIABILITY

[303] I disagree with the Court's holding that no clear and

convincing evidence exists to support the jury's finding that Gates acted with actual malice. To the contrary, though Gates contends he never believed Bentley was corrupt, he participated on Bunton's program numerous times when Bunton repeatedly talked about Bentley's alleged corruption. And, on at least two of those occasions, Gates agreed with Bunton's statements, and Gates even listed additional examples of Bentley's alleged corruption. Based on the Court's extensive discussion about defamation jurisprudence and the actual malice standard, I conclude that this is clear and convincing evidence to support the jury's finding that Gates acted with actual malice.

[304] The jury also found that Bunton and Gates conspired to defame Bentley. The jury assessed the damages Bunton and Gates each caused individually, but the trial court refused to hold them jointly and severally liable for the total damages. In response to Bentley's argument that the trial court erred in refusing to impose joint and several liability on Bunton and Gates, the court of appeals conceded that conspirators can be held jointly liable for acts done in furtherance of a conspiracy. __ S.W.3d at __. However, the court of appeals concluded that, "[i]n order to be entitled to judgment for joint and several liability, Bentley was required to secure a jury finding on the amount of damages he suffered as a result of the conspiracy itself." __S.W.3d at __ (citing Belz v. Belz, 667 S.W.2d 240, 243 (Tex. App.-Dallas 1984, writ ref'd n.r.e.)). The court of appeals explained that Gates could not be liable for the damages the jury awarded against Bunton, because many of the defamatory acts occurred before Gates's involvement in the Q & A program. __ S.W.3d at __. The court of appeals concluded that, to impose joint and several liability, a separate finding on the conspiracy damages was required but not submitted, and Bentley waived any objection to the charge as

submitted. __ S.W.3d at __. Consequently, the court of appeals rejected Bentley's argument that the trial court should have held Gates and Bunton jointly and severally liable. __ S.W.3d at __.

[305] A. Applicable Law

[306] A civil conspiracy is "a combination by two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means." Firestone Steel Products Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996); see also State v. Standard Oil Co., 107 S.W.2d 550, 559 (Tex. 1937). "The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983) (citations omitted).

[307] A party who joins in a conspiracy is jointly and severally liable "for all acts done by any of the conspirators in furtherance of the unlawful combination." Carroll v. Timmers Chevrolet, Inc., 592 S.W.2d 922, 926 (Tex. 1979) (quoting State v. Standard Oil, 107 S.W.2d at 559) (emphasis added); see also Akin v. Dahl, 661 S.W.2d 917, 921 (Tex. 1983) ("[O]nce a civil conspiracy is found, each co-conspirator is responsible for the action of any of the co-conspirators which is in furtherance of the unlawful combination."). Thus, if a conspiracy is proven, it can extend liability in tort beyond the active wrongdoer to those conspirators who may have merely planned, assisted, or encouraged the wrongdoer's acts. See

Carroll, 592 S.W.2d at 926. All the plaintiff must show for the alleged conspirators to be held jointly and severally liable is that they acted "in pursuance of the common purpose of the conspiracy." Carroll, 592 S.W.2d at 928 (citing Berry v. Golden Light Coffee Co., 327 S.W.2d 436, 440 (Tex. 1959)) (emphasis added). "The gist of a civil conspiracy is the damage resulting from commission of a wrong which injures another, and not the conspiracy itself." Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 856 (Tex. 1968).

[308] B. Analysis

[309] The court of appeals' holding ignores the fact that all members of a conspiracy are liable for their co-conspirators' wrongful acts. And, even if a co-conspirator's acts occurred before the conspiracy formed, all the conspiring parties are liable for those acts, as long as those acts are made in furtherance of the "common goal" of the conspiracy - in this case, defaming Bentley. See Akin, 661 S.W.2d at 921; Carroll, 592 S.W.2d at 926.

[310] Here, the jury found that Bunton published defamatory statements about Bentley with "actual malice" and "malice." The jury also found that Gates agreed with Bunton's defamatory statements and published his agreement with "actual malice" and "malice." Finally, the jury found that Bunton and Gates conspired to publish defamatory statements about Bentley. Thus, both Bunton and Gates acted with actual malice, and Bentley established the elements of the conspiracy. Accordingly, under Texas law, Gates and Bunton are jointly

and severally liable "for all acts done by any of the conspirators" in furtherance of the "common purpose" of the conspiracy. Carroll, 592 S.W.2d at 926; see also Akin, 661 S.W.2d at 921. In other words, our jurisprudence does not require the trial court to separately submit each co-conspirator's civil conspiracy damages. When the jury found that liability for a civil conspiracy existed, this finding requires the legal conclusion to impose joint and several liability on the co-conspirators.

[311] Because the co-conspirators' common purpose in this case was to defame Bentley, the trial court was obligated to impose joint and several liability on Gates for all the damages arising from the common purpose, including those damages arising from defamatory statements made before Gates "joined" the conspiracy. See Akin, 661 S.W.2d at 921; Carroll, 592 S.W.2d at 926. Therefore, I would reverse the court of appeals' holding about Bunton's and Gates's joint and several liability and render the judgment the trial court should have rendered based on the jury's verdict. That is, Bunton and Gates, as co-conspirators, were jointly and severally liable for the total damages the jury found against each individual co-conspirator defendant.

[312] II. MENTAL ANGUISH DAMAGES

[313] A. Applicable Law

[314] The United States Supreme Court has held that plaintiffs in state courts may not recover presumed or punitive damages for defamation if they do not show liability based on actual malice, which is "knowledge of falsity or reckless disregard for the truth." Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Thus, defamed plaintiffs who need only prove a lower culpability standard than actual malice may only recover compensation for "actual injury." Gertz, 418 U.S. at 349. However, actual injuries are not limited to out-of-pocket losses. Gertz, 418 U.S. at 350. "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Gertz, 418 U.S. at 350 (emphasis added); see also Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976).

[315] In Texas, the standard for reviewing an excessive damages complaint is factual sufficiency of the evidence. See Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 406 (Tex. 1998); Rose v. Doctors Hosp., 801 S.W.2d 841, 847-48 (Tex. 1990); Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986). Further, Texas jurisprudence dictates that the standard for reviewing whether a trial court should have ordered a remittitur is factual sufficiency. Rose, 801 S.W.2d at 847-48; Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987). Because whether damages are excessive and whether a remittitur is appropriate are factual determinations that are final in the court of appeals, this Court lacks jurisdiction to review such findings, consider excessive damages complaints, and suggest remittiturs. Tex. Const. art. V, § 6; Tex. Gov't Code § 22.225(a); Tex. R. App. P. 46; Akin, 661 S.W.2d at 921; Sweet v. Port Terminal R.R. Ass'n, 653 S.W.2d 291, 295 (Tex. 1983); Hall v. Villarreal Dev. Corp., 522 S.W.2d 195, 195 (Tex. 1975).

[316] B. Analysis

[317] Because the Court concludes that clear and convincing evidence exists to prove Bunton acted with actual malice in defaming Bentley, the Court's remaining constitutionally appropriate inquiry is solely whether there is legally sufficient evidence to support the damages awarded. See Tex. Const. art. V, § 6; Tex. Gov't Code § 22.225(a); see also Hall, 522 S.W.2d at 195 (Texas Supreme Court lacks jurisdiction to entertain factual insufficiency points.). But, ignoring our jurisprudence and the constitutional restraints on this Court's appellate review power, the Court impermissibly conducts a factual sufficiency review of the record - heavily putting its thumb on the scale - to conclude that the mental anguish damages award "is not merely excessive and unreasonable; it is far beyond any figure the evidence can support." __ S.W.3d at __. The Court explains that "while the record supports Bentley's recovery of some amount of mental anguish damages, it does not support the amount of those damages found by the jury." __ S.W.3d at __. And then, based on no authority whatsoever, the Court remands the case to the court of appeals "to reconsider" the excessiveness of the jury's mental anguish damages award or "to suggest" a remittitur. __ S.W.3d at __.

[318] The Court asserts two reasons for why this case permits the Court to review the excessiveness of the jury's mental anguish damages award. First, relying on Gertz, the Court holds that "the First Amendment requires appellate review of amounts awarded for non-economic damages in

defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant." __ S.W.3d at __. The Court reasons that the possibility that a jury may award significant damages "unrestrained by meaningful appellate review" poses a threat to First Amendment speech. __ S.W.3d at __.

[319] But the Court misreads and misapplies Gertz and can only have done so purposely. Thus, the Court uses this First Amendment case as a mere guise to reach a damages issue that this Court otherwise cannot consider. In Gertz, the U.S. Supreme Court expressly limited its holding that defamed private plaintiffs may recover compensation only for "actual injuries" to situations in which state law sets a lower culpability standard than actual malice. Gertz, 418 U.S. at 349. The Supreme Court stated: "[T]he private defamation plaintiff who established liability under a less demanding standard than [that stated by New York Times v. Sullivan, 376 U.S. 254 (1964)] may recover only such damages as are sufficient to compensate him for actual injury." Gertz, 418 U.S. at 349 (emphasis added). Thus, a reviewing court is authorized to review damage awards and limit a defamed plaintiff's damages to those reflecting "actual injury" when the culpability standard is less than actual malice. Gertz, 418 U.S. at 349.

[320] In contrast, when a state court applies the actual malice standard the Supreme Court announced in New York Times, 376 U.S. at 279-80, for determining liability for defaming public figures, Gertz's concern about the type and amount of damages is no longer an issue. Under the New York Times test, the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating

to his official conduct unless he proves that the statement was made with `actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 279-80. Thus, a public figure plaintiff who shows the defamatory statements were made with actual malice can recover both actual and punitive damages, as long as "competent evidence" supports the damages award. Herbert v. Lando, 441 U.S. 153, 164 & n.12 (1979).

[321] Here, Bentley is a public figure, and the trial court required the jury to find actual malice before imposing liability on Bunton and Gates. Consequently, Gertz's requirement that state courts limit damages to those reflecting actual injury when the state's law creates a lower culpability standard for private plaintiff defamation cases simply does not apply.

[322] Additionally, even if we assume that Gertz's constitutional concerns about damages applies in a public figure defamation case in which actual malice is the culpability standard, the Court improperly relies on Gertz to reverse the mental anguish damages award. The Court assumes that "actual injury" under Gertz excludes mental anguish, and therefore, Gertz authorizes the Court to specially scrutinize the mental anguish damages here. However, the Court refuses to recognize that, in the face of its desire to apply First Amendment rights to limit damages, the Gertz Court explicitly included mental anguish damages as "actual injuries" that a private defamed plaintiff can recover. Gertz, 418 U.S. at 349-50. And, in a later case, the Supreme Court reaffirmed that a private plaintiff may recover mental anguish damages even under a lower culpability standard and required only that the actual damages awarded be supported by "competent

evidence." See Time, Inc., 424 U.S. at 460.

[323] In Time, Inc., the U.S. Supreme Court did not apply the New York Times actual malice test because the plaintiff was not a public figure. Time, Inc., 424 U.S. at 454-55. After refusing to apply the actual malice standard, the Supreme Court flatly rejected Time's argument that Gertz did not permit a recovery for mental anguish damages, because, according to Time, "the only compensable injury in a defamation case is that which may be done to one's reputation." Time, Inc., 424 U.S. at 460. The Supreme Court stated: "In [Gertz] we made it clear that States could base awards on elements other than injury to reputation, specifically listing `personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault." Time, Inc., 424 U.S. at 460.

[324] Here, the Court does not go so far as the defendant in Time, Inc. to assert that Gertz does not allow a defamed plaintiff to recover mental anguish damages. The Court instead reads Gertz to mandate "appellate review of non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries." __ S.W.3d at __. But again, even if we assume Gertz applies to public figure defamation cases, nothing in Gertz even suggests that this Court must apply special appellate scrutiny other than the review this Court typically conducts when examining mental anguish damages awards. The Supreme Court expressly held in Time, Inc. that mental anguish is an actual injury for which defamed private plaintiffs may recover damages.

[325] In sum, the Court relies on a defamation case that holds contrary to what the Court reads it to say, and stretches that case's holding beyond recognition, to impermissibly review the mental anguish damages award in a manner contrary to the Court's established no evidence review. Furthermore, Gertz's constitutional concern that a jury's discretion in awarding damages not "inhibit the vigorous exercise of First Amendment freedoms" is not an issue here, because that case and its progeny recognize that a defamed private plaintiff may recover mental anguish damages as actual injury even when state law does not require an actual malice showing. See Gertz, 418 U.S. at 349; see also Time, Inc., 424 U.S. at 460; Herbert, 441 U.S. at 164 & n.12. Finally, and most importantly, Gertz's concern that damage awards for defamed private plaintiffs not chill First Amendment rights is otherwise protected in First Amendment cases (like the present case) that involve public figures. That is because, before imposing liability, the Supreme Court requires that a public figure defamation plaintiff produce clear and convincing evidence that the defendant acted with actual malice. See, e.g., New York Times, 376 U.S. at 279-80. And, when a public figure defamation plaintiff has met this onerous burden of proving actual malice, the Supreme Court has upheld the compensatory and punitive damages awarded. See, e.g., Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 661, 693 (1989).

[326] The Court also relies on Texas common law to impermissibly conduct a factual sufficiency review of the mental anguish damages award. The Court acknowledges that courts of appeals have authority to consider excessive damages complaints, but it further contends that this Court has "rejected the view that [the courts of appeals'] authority displaces [this Court's] obligation to determine whether there is any evidence

at all of the amount of damages determined by the jury." __ S.W.3d at __ (citing and quoting Saenz v. Fidelity & Guar. Ins. Underwriters, 925 S.W.2d 607, 612 (Tex. 1996)). But Saenz is totally inapplicable.

[327] In Saenz, this Court applied a traditional no evidence review to a $250,000 mental anguish damages award that a plaintiff recovered against her workers' compensation insurance carrier. Saenz, 925 S.W.2d at 612. The Court acknowledged the Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995), factors for proving mental anguish and discussed the limited evidence the plaintiff offered to show her mental anguish. Then, the Court concluded that there was "no evidence. . . that Saenz suffered mental anguish or that $250,000 would be fair and reasonable compensation." Saenz, 925 S.W.2d at 614. Thus, the Court rendered judgment that the plaintiff take nothing. Saenz, 925 S.W.2d at 614.

[328] Here, unlike Saenz where the Court held there was no evidence of mental anguish at all, the Court observes that "[t]he record leaves no doubt that Bentley suffered mental anguish as a result of Bunton's and Gates's statements." __ S.W.3d at __. As the Court explains, Bentley testified that the ordeal had cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school. Bentley said this experience was the worst of his life. Friends testified that Bentley had been depressed, that his honor and integrity had been impugned, that his family had suffered, too, adding to his own distress, and that he never would be the same. And Bunton's relentlessness in accusing Bentley of corruption caused him much anxiety. __ S.W.3d at

—.

[329] But, after listing this parade of horribles, the Court remarkably holds that, while this evidence supports Bentley's recovering "some amount of mental anguish damages," this is no evidence that Bentley suffered mental anguish damages amounting to $7 million. __ S.W.3d at __, __. Then, based on this amazing conclusion, the Court holds that a remand is necessary for the court of appeals to "reconsider" the excessiveness of the jury's mental anguish damages award, advises that the court of appeals suggest a remittitur, and opines that the case may need to be retried. __ S.W.3d at __. It is no surprise to me that the Court cites no authority for remanding the case with these instructions. For there is none. And, the Court entirely glosses over the fact, as it must to reach its conclusion, that the court of appeals already considered the excessive damages complaint. Indeed, the court of appeals concluded, "[t]here is nothing in the record to suggest that the jury was guided by anything other than a conscientious consideration of the evidence and the instructions of the trial court. We conclude that the evidence is legally and factually sufficient to support the jury's award of $7,150,000." __ S.W.3d at __. Yet the Court ignores this holding, inappropriately assumes a fact-finder role, and sends the case back to the court of appeals.

[330] The U.S. Supreme Court has recognized that the Constitution does not "impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated." Time, Inc., 424 U.S. at 461. A state may apply its methods for making factual determinations, as long as some element of the state court system determines that the

defendants are at fault. Time, Inc., 424 U.S. at 464. This statement certainly demonstrates that our state's rules for appellate courts' reviewing claims of excessive damages - factual sufficiency in the courts of appeals only - applies to reviewing mental anguish damage awards in defamation cases. Tex. Const. art. V, § 6; Tex. Gov't Code § 22.225(a); Sweet, 653 S.W.2d at 294-95; see also Maritime Overseas, 971 S.W.2d at 406; Rose, 801 S.W.2d at 847-48; Pope, 711 S.W.2d at 624.

[331] Thus, contrary to the Court's holding, it is clear that the First Amendment does not require this Court to review the evidence supporting the mental anguish damages award to determine if it is "reasonable" - a proxy for factual sufficiency review. Simply put, the Court oversteps its constitutional appellate review boundaries to conduct what effectively results in a factual sufficiency review of the mental anguish damages award and issues a wholly advisory opinion to the court of appeals about those damages. Applying our traditional legal sufficiency standard for reviewing damages awards, I would hold that there is some evidence to support the damages the jury awarded. See Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001).

[332] III. DISPOSITION

[333] The Court's writings in this case suggest three different views about this case's final disposition: (1) Justice Hecht holds that Bunton is liable while Gates is not and that a remand is required for the court of appeals to reconsider the mental anguish damages award; (2) Chief Justice Phillips holds

that Bunton and Gates are not liable and thus the Court should enter a take nothing judgment against Bentley; and (3) I would hold that Bunton and Gates are liable and thus the Court should enter the judgment the trial court should have rendered based on the jury's verdict and determine Bunton and Gates jointly and severally liable.

[334] Despite these three clearly distinctive, non-majority positions about the case's final outcome, Justice Hecht's remand disposition wins the day, because seven Justices join in the judgment "remanding this cause to the court of appeals for further proceedings." See __ S.W.3d at __. It completely escapes me how three Justices who agree with this remand disposition can join Chief Justice Phillips' opinion that neither Gates nor Bunton are liable. Though these Justices agree that no liability exists whatsoever, they join in a judgment that remands to the court of appeals solely to reassess the damages awarded.

[335] The Court's split on the disposition certainly suggests that this case, particularly Justice Hecht's writing about why a remand is necessary, should not carry any precedential value. Indeed, when the U.S. Supreme Court is dead-locked in a case because a Justice is recused, the Supreme Court renders a judgment that affirms the lower court's judgment "by an equally divided Court" and that "judgment is without force as precedent." See Ohio ex re. Eaton v. Price, 364 U.S. 263, 264 (1960). Similarly, because Justice Hecht does not have a majority for his remand rationale, this case should have no precedential value.

[336] IV. CONCLUSION

[337] "Oh what a tangled web we weave, When first we practise to deceive!" Sir Walter Scott, Marmion, canto vi., stanza 17.

[338] The Court's writing is nothing more than an epistle of the First Amendment Gospel according to Justice Hecht, the effect of which is to transmogrify Texas law about reviewing mental anguish damages awards in defamation cases. I would hold that there is clear and convincing evidence to support the jury's findings that Gates and Bunton acted with actual malice in defaming Bentley. And, because the jury found Bunton and Gates were co-conspirators, I would impose joint and several liability for the damages the jury awarded. Because the Court holds otherwise, I dissent.

[339] James A. Baker, Justice

Opinion Footnotes

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[340] *fn1 ___ S.W.3d ___ (Tex. App.-Tyler 1999).

[341] *fn2 Texas Almanac 157 (1995).

[342] *fn3 See Tex. Code Crim. Proc. art. 42.12, § 5(a).

[343] *fn4 See Tex. Penal Code § 32.31.

[344] *fn5 See Tex. Code Crim. Proc. arts. 17.03, 17.031, 17.04.

[345] *fn6 See, e.g., Tex. Penal Code §§ 36.02 (bribery), 36.03 (coercion of public servant or voter), 39.02 (abuse of official capacity).

[346] *fn7 See Tex. Code Crim. Proc. art. 17.03(a) (stating that with certain exceptions not applicable here, "a magistrate may, in the magistrate's discretion, release the defendant on his personal bond without sureties or other security").

[347] *fn8 Id. art. 2.18 ("When a prisoner is committed to jail by warrant from a magistrate or court, he shall be placed in jail by the sheriff. It is a violation of duty on the part of any sheriff to permit a defendant so committed to remain out of jail, except that he may, when a defendant is committed for want of bail, or when he arrests in a bailable case, give the person arrested a reasonable time to procure bail; but he shall so guard the accused as to prevent escape.").

[348] *fn9 Tex. Penal Code § 39.02(a)(1) ("A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly . . . violates a law relating to the public servant's office or employment . . . .").

[349] *fn10 See Tex. Code Crim. Proc. art. 52.01(a) ("When a judge of any district court of this state, acting in his capacity as magistrate, has probable cause to believe that an offense has been committed against the laws of this state, he may request that the presiding judge of the administrative judicial district appoint a district judge to commence a Court of Inquiry.").

[350] *fn11 See id. art. 2.10 ("It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be

brought to punishment.").

[351] *fn12 See Tex. Loc. Gov't Code §§ 84.002 (providing for the appointment of a county auditor in certain counties by the district judges), 84.009 (providing for removal of the county auditor by the appointing judges).

[352] *fn13 See Tex. Const. art. V, § 8 ("The District Court shall have . . . general supervisory control over the County Commissioners Court . . . ."); Tex. Gov't Code § 24.020 ("The district court has . . . general supervisory control over the commissioners court . . . .").

[353] *fn14 See Tex. Code Jud. Conduct Canon 3(D)(1) ("A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.").

[354] *fn15 See Tex. Loc. Gov't Code § 87.015 (providing for petitions for the removal of a district attorney and other officers).

[355] *fn16 See note 13, supra.

[356] *fn17 See Webster's Third New Int'l Dictionary at 512 (1961) (defining "corrupt" as "depraved, evil: perverted into a state of moral weakness or wickedness", "of debased political morality : characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements").

[357] *fn18 See Tex. Code Crim. Proc. arts. 17.03, 17.031, 17.04.

[358] *fn19 See id. arts. 59.06 ("Disposition of Forfeited Property"), 103.004 ("Disposition of Collected Money").

[359] *fn20 ___ S.W.3d ___ (Tex. App. -Tyler 1999).

[360] *fn21 Id. at ___.

[361] *fn22 Id. at ___.

[362] *fn23 Id. at ___.

[363] *fn24 Id. at ___.

[364] *fn25 Id. at ___.

[365] *fn26 44 Tex. Sup. Ct. J. 196-197 (Dec. 21, 2000).

[366] *fn27 Tex. Const. art. I, § 8.

[367] *fn28 Turner v. KTRK Television, Inc., 38 S.W.3d 103, 116 (Tex. 2000) ("we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee"); Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425, 434 (Tex. 1998) ("This Court has recognized that `in some aspects our free speech provision is broader than the First Amendment.'"); Cain v. Hearst Corp., 878 S.W.2d 577, 584 (Tex. 1994) ("this Court [has] recognized that in some aspects our free speech provision is broader than the First Amendment"); Ex parte Tucci, 859 S.W.2d 1, 5 (Tex. 1993) ("`article one, section eight . . . provides greater rights of free expression than its federal equivalent'"); Davenport v. Garcia, 834 S.W.2d 4, 8 (Tex. 1992) ("we have recognized that in some aspects our free speech provision is broader than the First Amendment"); Casso v. Brand, 776 S.W.2d 551, 556 (Tex.

1989) ("our state free speech guarantee may be broader than the corresponding federal guarantee"); O'Quinn v. State Bar of Tex., 763 S.W.2d 397, 402 (Tex. 1988) ("it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the first amendment's proscription of Congress from abridging freedom of speech").

[368] *fn29 980 S.W.2d at 434 (citations omitted, emphasis in original).

[369] *fn30 38 S.W.3d at 116-117 (citations omitted, emphasis in original).

[370] *fn31 Tucci, 859 S.W.2d at 32 (Phillips, C.J., concurring).

[371] *fn32 E.g., HL Farm Corp. v. Self, 877 S.W.2d 288, 290 (Tex. 1994); R Communications, Inc. v. Sharp, 875 S.W.2d 314, 315 (Tex. 1994); Tucci, 859 S.W.2d at 5 (plurality opinion).

[372] *fn33 E.g., Commission for Lawyer Discipline, 980 S.W.2d at 429-430; Operation Rescue v. Planned Parenthood, Inc., 975 S.W.2d 546, 556 (Tex. 1998); Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996); Texas Ass'n of Bus. v. Texas Air

Control Bd., 852 S.W.2d 440 (Tex. 1993).

[373] *fn34 See, e.g., Davenport, 834 S.W.2d at 17-18.

[374] *fn35 Turner, 38 S.W.3d at 115.

[375] *fn36 497 U.S. 1 (1990); cf. Carr v. Brasher, 776 S.W.2d 567, 570 (Tex. 1989) (noting at that time that the United States Supreme Court had not provided guidance on the issue).

[376] *fn37 497 U.S. at 13.

[377] *fn38 See, e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (announcing a four-part test for distinguishing assertions of fact from expressions of opinion); see also Robert D. Sack, Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment", 100 Colum. L. Rev. 294, 323-325 (2000); cf. Carr, 776 S.W.2d at 570 (noting but not applying the Ollman factors).

[378] *fn39 497 U.S. at 19 (quoting Philadelphia

Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964))).

[379] *fn40 Id. at 19-20, 20 n.6 (citing Hepps, 475 U.S. at 779).

[380] *fn41 Id. at 20 (citing Greenbelt Coop. Pub. Ass'n., Inc. v. Bresler, 398 U.S. 6 (1970); Letter Carriers v. Austin, 418 U.S. 264 (1974); and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)).

[381] *fn42 Id. (citing New York Times v. Sullivan, 376 U.S. 254 (1964); Curtis Pub. v. Butts, 388 U.S. 130 (1967) (plurality opinion); and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

[382] *fn43 Id. at 21.

[383] *fn44 Id. at 19-21; see Carr, 776 S.W.2d at 570; see also Robert D. Sack, Sack on Defamation § 4.3.7, at 4-54 (3d ed. 2002) ("The vast majority of courts, and all of the federal circuits, agree that whether a statement is fact or opinion is a matter of law for the court to decide.").

[384] *fn45 Restatement (Second) of Torts § 566 (1977).

[385] *fn46 W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 113A, at 813-814 (5th ed. 1984).

[386] *fn47 750 F.2d 970 (D.C. Cir. 1984) (en banc); cf. Carr v. Brasher, 776 S.W.2d 567, 570 (Tex. 1989) (noting but not applying the Ollman factors).

[387] *fn48 See Rodney A. Smolla, Law of Defamation § 6.12[1] at 6.44-6.47 (2d ed. 2001); Bruce W. Sanford, Libel & Privacy § 5.3.2, at 148-149 (2d ed. 2001).

[388] *fn49 497 U.S. at 20 (citation omitted).

[389] *fn50 See, e.g., 600 West 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 937 (N.Y. 1992) (concluding that statement made at public hearing on a building permit application that the plaintiff's conduct "`is as fraudulent as you can get and it smells of bribery and corruption'" was merely opinion, given the lack of factual specificity and the tenor of its presentation, a "rambling, table-slapping monologue" and "angry, unfocused diatribe"); Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1306-1308 (N.Y. 1977)(suggesting that statements that a judge was "probably

corrupt" were opinions that had not been proven factually false); Maynard v. Daily Gazette Co., 447 S.E.2d 293, 299 (W. Va. 1994) (holding that editorial stating that college athletic director's conduct was part of the "corruption of college athletics" did not actually accuse the director of corruption and was thus merely opinion); Price v. Viking Penguin, Inc., 881 F.2d 1426, 1445 (8th Cir. 1989) (holding that author's quotation of an attorney calling an FBI agent "corrupt and vicious" was unverifiable opinion); Silvester v. American Broad. Cos., 650 F. Supp. 766, 772 (S.D. Fla. 1986) (holding that an unspecific claim that "`jai alai is a totally corrupt industry'" was "a statement of opinion . . . too general to support an action for libel"); cf. Greenbelt Coop. Pub.g Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970) (concluding that accurate newspaper reports of heated debates before city council in which the plaintiff's negotiating efforts were criticized as "blackmail" could not have been reasonably understood by any reader to refer to the commission of a crime).

[390] *fn51 See, e.g., Moore v. Leverett, 52 S.W.2d 252, 255 (Tex. Comm'n App. 1932, holding approved) ("To make a statement that a public officer is actuated by evil or corrupt motives in a public undertaking is to make a statement of fact which should be justified like any other statement of fact in order to exonerate the person making the statement."); Silsdorf v. Levine, 449 N.E.2d 716, 720-721 (N.Y. 1983) (holding that accusations of "corruptness" in an open letter were not merely opinion because they purported to be factual); Kelly v. Schmidberger, 806 F.2d 44, 49 (2d Cir. 1986) (stating that assertions of mishandling church property were factual, suggesting corrupt or criminal conduct, and were therefore actionable).

[391] *fn52 Plato, Socrates' Defense 24b (in The Collected Dialogues of Plato 10 (edited by Edith Hamilton and Huntington Cairns, Pantheon Books 1961)) ("Socrates is guilty of corrupting the minds of the young, and in believing in deities of his own invention instead of the gods recognized by the state. Such is the charge.").

[392] *fn53 See, e.g., Tex. Agric. Code § 59.003 (stating that a farm and ranch finance program board member may be liable for an official act or omission that is corrupt); Tex. Civ. Prac. & Rem. Code § 171.088(a) (stating that an arbitration award may be set aside if obtained by corruption or if an arbitrator was corrupt); Tex. Fin. Code § 12.106 (stating that an employee of the banking department is not liable for an official act or omission unless it is corrupt); id. § 14.055 (same for an employee of the consumer credit commission); id. § 89.006 (same for an employee of the savings and loan department); Tex. Gov't Code § 52.024 (stating that the court reporter certification board may refuse to certify an applicant convicted of a crime involving corruption); id. § 52.029(a) (stating that a court reporter may be sanctioned for corruption); Tex. Loc. Gov't Code § 22.077(a) (stating that a municipal officer may be removed for corruption).

[393] *fn54 W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 112, at 791-792 (5th ed. 1984).

[394] *fn55 246 S.W. 777, 783 (Tex. 1922) (quoting

Negley v. Farrow, 60 Md. 158 (1883)).

[395] *fn56 See note 62, supra.

[396] *fn57 A.S. Abell Co. v. Kirby, 176 A.2d 340, 343 (Md. 1961) (citing Prosser on Torts 622 (2d ed. 1955) and Thayer, Legal Control of the Press § 66 (3d ed. 1956)), cited in Sack, supra note 44, § 4.3.6, at 4-52 n.220.

[397] *fn58 Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984) (en banc).

[398] *fn59 Milkovich, 497 U.S. at 18-19.

[399] *fn60 47 U.S.C. § 531.

[400] *fn61 Report of the Committee on Energy and Commerce on the Cable Franchise Policy and Communications Act of 1984, H.R. Rep. No. 98-934, at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667, and cited in Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n, 518 U.S. 727, 734, 739 (1996).

[401] *fn62 New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964) (requiring that a public figure or public official prove falsity); Turner v. KTRK Television, Inc., 38 S.W.3d 103, 117-120 (Tex. 2000). See also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (stating that if the defamatory speech is of public concern and the defendant is a member of the media, the plaintiff has the burden of proving falsity, but reserving the question of who has the burden if the defendant is not a member of the media); Milkovich v. Lorain Journal, Co., 497 U.S. 1, 19-20, 20 n.6 (1990) (same); McIlvain v. Jacobs,794 S.W.2d 14, 15 (Tex. 1990) (applying Hepps, 475 U.S. at 787). Cf. Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995) ("In suits brought by private individuals, truth is an affirmative defense to slander."); Tex. Civ. Prac. & Rem. Code § 73.005 ("The truth of the statement in the publication on which an action for libel is based is a defense to the action."); Sack, supra note 44, § 3.3.2.2, at 3-9 to 3-12 (3d ed. 2001) (stating that the plaintiff may have the burden of proving the falsity of a statement of public interest even if the defendant is not a member of the media, but that the common law rule that truth is a defense to be pleaded and proved by the defendant may apply in cases where the speech is about a nonpublic subject); Smolla, supra note 48, § 5.07 at 5.11-.13 (2d ed. 2001) (stating that the assignment of the burden of proof of falsity is an unresolved question in many contexts); Bruce W. Sanford, Libel & Privacy § 6.3-6.3.3, at 213-219 (2d ed. 2001).

[402] *fn63 See Sack, supra note 38, at 326-327 (stating that the burden of proof on a plaintiff who is not a public official or a public figure suing media defendants is an open question, and citing cases).

[403] *fn64 ___ S.W.3d at ___.

[404] *fn65 Turner, 38 S.W.3d at 117.

[405] *fn66 See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 557, 661 n.2 (1989)("There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. We express no view on this issue." (citations omitted)).

[406] *fn67 See note 5, supra.

[407] *fn68 See note 13, supra.

[408] *fn69 See note 15, supra.

[409] *fn70 See note 13, supra.

[410] *fn71 State v. District Court, 240 N.W. 406, 409

(Wis. 1932).

[411] *fn72 376 U.S. 254 (1964).

[412] *fn73 Id. at 270.

[413] *fn74 Id. at 279-280. See also Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 420 (Tex. 2000).

[414] *fn75 Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 n.7 (1989). See Huckabee, 19 S.W.3d at 420.

[415] *fn76 Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 511 (1991).

[416] *fn77 Garrison v. Louisiana, 379 U.S. 64, 75 (1964)(quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[417] *fn78 New York Times v. Sullivan, 376 U.S. at

279-280; Huckabee, 19 S.W.3d at 420.

[418] *fn79 Harte-Hanks, 491 U.S. at 688.

[419] *fn80 Herbert v. Lando, 441 U.S. 153, 160 (1979).

[420] *fn81 Harte-Hanks, 491 U.S. at 688; Herbert, 441 U.S. at 160; St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[421] *fn82 Garrison, 379 U.S. at 79.

[422] *fn83 Harte-Hanks, 491 U.S. at 688 (quoting St. Amant, 390 U.S. at 731).

[423] *fn84 Harte-Hanks, 491 U.S. at 688 (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[424] *fn85 St. Amant, 390 U.S. at 733 (citing New York Times, 376 U.S. at 287-288).

[425] *fn86 Harte-Hanks, 491 U.S. at 667-668.

[426] *fn87 Id. at 668 (citations omitted).

[427] *fn88 Id. at 688.

[428] *fn89 St. Amant, 390 U.S. at 730.

[429] *fn90 Monitor Patriot Co. v. Roy, 401 U.S. 265, 276 (1971).

[430] *fn91 St. Amant, 390 U.S. at 730-731.

[431] *fn92 Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., dissenting)).

[432] *fn93 491 U.S. 657 (1989).

[433] *fn94 Id. at 686 (quoting Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971)).

[434] *fn95 Harte-Hanks, 491 U.S. at 691.

[435] *fn96 388 U.S. 130 (1967).

[436] *fn97 Id. at 137 (plurality opinion).

[437] *fn98 Id. at 158 (plurality opinion).

[438] *fn99 Id. at 156 (plurality opinion).

[439] *fn100 Id. at 170 (Warren, C.J., concurring).

[440] *fn101 388 U.S. 130 (1967).

[441] *fn102 Id. at 155 (plurality opinion).

[442] *fn103 401 U.S. 279 (1971).

[443] *fn104 Id. at 287.

[444] *fn105 Id. at 290.

[445] *fn106 466 U.S. 485 (1984).

[446] *fn107 Id. at 488.

[447] *fn108 Id. at 512.

[448] *fn109 Id. at 513.

[449] *fn110 389 U.S. 81, 84-85 (1967) (per curiam).

[450] *fn111 New York Times Co. v. Sullivan, 376 U.S. 254, 287-288 (1964).

[451] *fn112 Id. at 284.

[452] *fn113 390 U.S. 727 (1968).

[453] *fn114 Id. at 733.

[454] *fn115 Id. at 731-732.

[455] *fn116 Id. at 732.

[456] *fn117 See WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 574 (Tex. 1998).

[457] *fn118 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 55 (1971) (proof must be with "convincing clarity", citing New York Times v. Sullivan, 376 U.S. at 285); Turner v. KTRK Television, Inc., 38 S.W.3d 103, 119 (Tex. 2000).

[458] *fn119 Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685-686 (1989); Bose Corp. v.

Consumers Union, 466 U.S. 485, 510-511 (1984).

[459] *fn120 Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 285 n.11 (1990) (citing In re Jobes, 529 A.2d 434, 441 (N.J. 1987), regarding the proof necessary to justify the withdrawal of life support).

[460] *fn121 Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 422(Tex. 2000).

[461] *fn122 Bose, 466 U.S. at 510-511.

[462] *fn123 Harte-Hanks, 491 U.S. at 685 (citing Bose, 466 U.S. at 510-511).

[463] *fn124 Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

[464] *fn125 Harte-Hanks, 491 U.S. at 688.

[465] *fn126 Id (citation omitted).

[466] *fn127 Id. at 690.

[467] *fn128 Id. at 691.

[468] *fn129 Id.

[469] *fn130 Id. at 692 (citation omitted).

[470] *fn131 Id. at 690-691.

[471] *fn132 Id.

[472] *fn133 St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

[473] *fn134 See Tex. Civ. Prac. & Rem. Code § 41.001(7).

[474] *fn135 Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 315 n.10 (5th Cir. 1995); see Sack, supra note 44, § 5.5.2, at 5-77 to 5-78; Smolla, supra note 48, §§ 3.15-3.16, at 3-42.1 to 3-42.2.

[475] *fn136 Post at ___.

[476] *fn137 Id.

[477] *fn138 Id.

[478] *fn139 38 S.W.3d 103, 120 (Tex. 2000)(citation omitted).

[479] *fn140 See Leyendecker & Assoc., Inc. v. Wechter, 683 S.W.2d 369, 374 (Tex. 1984); City of Tyler v. Likes, 962 S.W.2d 489, 495 (Tex. 1997).

[480] *fn141 Leyendecker, 683 S.W.2d at 374-375.

[481] *fn142 418 U.S. 323, 349-350 (1974).

[482] *fn143 Id. at 349.

[483] *fn144 Id. at 350.

[484] *fn145 925 S.W.2d 607, 614 (Tex. 1996).

[485] *fn146 Tatum v. Preston Carter Co., 702 S.W.2d 186, 187-188 (Tex. 1986).

[486] *fn147 844 S.W.2d 198 (Tex. 1992).

[487] *fn148 879 S.W.2d 1 (Tex. 1993).

[488] *fn149 The jury in our case arguably made inconsistent factual findings. In its first three answers, the jury found that "Gates agreed with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt," that he "publish[ed] his agreement with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt," and that "Gates acted with actual malice in publishing his agreement with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt" by "clear and convincing

evidence." If the first question inquires about Gates' objective conduct on Q & A, it duplicates the second question about publication. If the first question asks about Gates' actual subjective agreement, then his publication could not have involved actual malice, a standard which requires Gates to have disbelieved or seriously doubted that Bentley was corrupt. Because I believe that there is not clear and convincing evidence of actual malice against either defendant, I need not decide whether a conflict exists, and, if so, what legal implications would follow.

[489] *fn150 On the air, Bunton mentioned receiving a telephone call from "somebody . . . claiming to be Judge Bentley," which suggests that he did not realize that Bentley himself had placed the call.

[490] *fn151 Although the Court erroneously claims that there is no evidence anyone other than Gates agreed with Bunton's allegations, ___S.W.3d at ___, the record does suggest that some of his viewers agreed with him. While testifying at trial about Q & A's periodic viewer polls asking whether or not Bentley was corrupt, Bentley testified: "I nearly won one time, I think."

[491] *fn152 The Court claims that this conversation proves that Bunton was privately admitting his lack of evidence against Bentley to a friend, "while he was telling the Q & A viewing audience that Bentley was corrupt." ___S.W.3d at ___. In fact, the witness testified at the 1997 trial that the conversation took place "sometime in the summer of 1995." Without a specific date, I cannot assume that it occurred after

Bunton's June 6, 1995 broadcast, during which he first accused Bentley of corruption.

[492] *fn153 Rather than determining which testimony the jury must have disbelieved in order to find actual malice and then accepting those findings if not clearly erroneous, as required by Harte-Hanks, 491 U.S. at 688, the Court has disregarded all of Bunton's exculpatory testimony even though it is not all inconsistent with the jury's verdict. Further, the jury's inconsistent findings regarding Gates, discussed in note 1, supra, raise the significant possibility that the jury may have also erroneously found actual malice against Bunton despite crediting his exculpatory testimony claiming subjective belief. Because I believe that there is not clear and convincing evidence of actual malice against Bunton with or without his exculpatory testimony, I proceed using only the evidence the Court has not disputed.

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APPENDIX G. Texas Twelfth Court of Appeals Opinion 1999

Bunton v. Bentley, No. 12-97-00376-CV, 1999.TX.0048575 (Tex.App. Dist.12 October 22, 1999) (VersusLaw)

[1] COURT OF APPEALS OF TEXAS, TWELFTH DISTRICT, TYLER

[2] NO. 12-97-00376-CV

[3] 1999.TX.0048575< http://www.versuslaw.com>

[4] October 22, 1999

[5] JOE ED BUNTON AND JACKIE GATES, APPELLANTS

v.

BASCOM W. BENTLEY, III, APPELLEE

[6] APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF ANDERSON COUNTY, TEXAS.

[7] Ramey Jr., C.J., Hadden, J., and Worthen, J.

[8] The opinion of the court was delivered by: Tom B. Ramey, Jr.

[9] Petition for Review Granted December 21, 2000.

[10] Affirmed in part and reversed and rendered in part.

[11] Joe Ed Bunton and Jackie Gates appeal from an adverse judgment finding them liable for defamation and conspiracy to defame a public official, Judge Bascom Bentley, III. The jury awarded substantial amounts in actual and exemplary damages. Bunton and Gates assert their entitlement to judgment as a matter of law and attack the sufficiency of the evidence to support the liability findings and the damage awards. Gates also asserts numerous charge errors. Bentley asserts the trial court erred in not imposing joint and several liability on Bunton and Gates. We affirm in part and reverse and render in part.

[12] FACTS

[13] Bunton was a founder and host of a local weekly cable television show called "Questions and Answers" ("Q & A"). The program provided a public forum to discuss local issues. Viewers were encouraged to call in to voice their opinions, ask questions, and share information about the subject under discussion during the show. Bentley, a district judge in Anderson and Cherokee Counties, was often selected as a topic to be discussed on the show. Bunton first aired his criticisms of Bentley on the June 6, 1995 show. On numerous occasions thereafter, Bunton, while hosting the show, called Bentley "corrupt." Once, Bunton called Bentley "criminal." Gates joined the show as a host or co-host in July 1995. Bentley sued Bunton, Gates, and others *fn1 for defamation and conspiracy to defame. At the close of Bentley's case, the trial court ruled as a matter of law that Bunton's statements constitute slander per se. The jury found actual malice and the existence of a conspiracy. The trial court entered judgment based on the jury's damage awards, assessing against Bunton $7,150,000 in actual damages and $1,000,000 in exemplary damages and assessing against Gates $95,000 in actual damages and $50,000 in exemplary damages.

[14] BUNTON'S ACTUAL MALICE

[15] In his first issue, Bunton asserts that the trial court should have rendered judgment for him as a matter of law because there is no evidence, or factually insufficient evidence, that any defamatory statement he made was uttered with actual malice. We interpret this point to be an attack on the trial court's denial of Bunton's motion for judgment

notwithstanding the verdict to the extent that the motion attacks the actual malice finding. *fn2 In his third issue, Bunton contends the evidence is legally and factually insufficient to support the jury's finding of actual malice. Bunton argues, in essence, that he had numerous bases for believing Bentley to be corrupt and a criminal which were true, and therefore, Bentley did not satisfy the requirement of showing that Bunton knew the allegations were false or had doubts as to their truthfulness.

[16] Standard of Review

[17] A motion for judgment notwithstanding the verdict should be granted when the evidence is conclusive and one party is entitled to judgment as a matter of law. Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 227-28 (Tex. 1990). In reviewing the denial of a motion for judgment notwithstanding the verdict, we review the evidence in the light most favorable to the jury findings, considering only the evidence and inferences that support them, and disregarding all evidence and inferences to the contrary. Navarette v. Temple Indep. Sch. Dist., 706 S.W.2d 308, 309 (Tex. 1986). If there is more than a scintilla of evidence to support the findings, the motion for judgment notwithstanding the verdict was properly denied. Mancorp, 802 S.W.2d at 228.

[18] If a party is attacking the factual sufficiency of an adverse finding on an issue to which the other party had the burden of proof, the attacking party must demonstrate that there is insufficient evidence to support the adverse finding.

See Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983). In addressing a factual sufficiency of the evidence challenge, this Court must consider and weigh all of the evidence and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). This Court is not a fact finder and may not pass on the credibility of the witnesses or substitute its judgment for that of the trier of fact. Clancy v. Zale Corp., 705 S.W.2d 820, 826 (Tex. App.--Dallas 1986, writ ref'd n.r.e.). Findings of fact are the exclusive province of the jury and/or trial court. Bellefonte Underwriters Ins. Co. v. Brown, 704 S.W.2d 742, 744 (Tex. 1986). Accordingly, if there is sufficient competent evidence of probative force to support the finding, it must be sustained. Beall v. Ditmore, 867 S.W.2d 791, 795-96 (Tex. App.--El Paso 1993, writ denied). Where there is conflicting evidence, the jury's verdict on such matters is generally regarded as conclusive. Id. at 796.

[19] Applicable Law

[20] Slander is an orally communicated or published defamatory statement made to a third person, without legal excuse, which is either defamatory in itself or defamatory because it results in actual damages. Simmons v. Ware, 920 S.W.2d 438, 444 (Tex. App.--Amarillo 1996, no writ). Statements are slanderous per se if they affect a person injuriously in his office, profession, or occupation. Id. at 451. If an oral statement unambiguously and falsely imputes criminal conduct to the plaintiff, it is slanderous per se. Campbell v. Salazar, 960 S.W.2d 719, 726 (Tex. App.--El Paso 1997, writ denied).

[21] The First Amendment to the United States Constitution prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. Carr v. Brasher, 776 S.W.2d 567, 570-71 (Tex. 1989). Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. Id. at 571. Reckless disregard is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Id. Negligence, such as failure to investigate, does not constitute actual malice. Beck v. Lone Star Broadcasting, Co., 970 S.W.2d 610, 617 (Tex. App.-- Tyler 1998, writ denied).

[22] It is not enough for the jury to disbelieve the defendant's testimony. See Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989). We are required to make an independent assessment of the record to determine if actual malice was established by clear and convincing evidence. Dolcefino v. Turner, 987 S.W.2d 100, 111 (Tex. App.--Houston [14th Dist.] 1998, writ granted). Actual malice may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the defendant's words or acts before, at, or after the time of the communication. Id.; International & G.N.R. Co. v. Edmundson, 222 S.W. 181, 184 (Tex. Comm'n App. 1920, holding approved). While evidence of ill will alone is not enough to establish actual malice, proof that the defendant entertained ill will toward the plaintiff is probative evidence that the defendant published the information either knowing of its falsity or with reckless disregard of its truth or falsity. Town of

South Padre Island v. Jacobs, 736 S.W.2d 134, 140 (Tex. App.--Corpus Christi 1986, writ denied).

[23] Discussion

[24] Bentley presented evidence addressing each of Bunton's bases for his defamatory remarks. Even after hearing the evidence showing that his reliance on these bases was misplaced, as we shall detail under Bunton's second issue, Bunton reasserted his claim that Bentley was corrupt and a criminal. In determining the existence of actual malice, this Court can consider Bunton's words before, at, and after the offending communication. See Dolcefino, 987 S.W.2d at 111. Bunton's continued assertion of the defamatory statements in light of the evidence at trial eroding his bases for believing them, demonstrates that Bunton made the defamatory statements with reckless disregard of the truth or falsity of the statements.

[25] Tucker Farris, a local businessman, testified that he had a conversation with Bunton in the summer of 1995. Bunton told Farris that he wanted to expose anything not right with Anderson County politics and that he had information on quite a few in the "clique." However, Bunton said to Fans that he had been unable to get anything on Bentley and that bothered him. Bunton told Farris, "I know he's doing something, I just don't know what."

[26] Bunton had been investigating Bentley's conduct for several months prior to this conversation. He made his first "on air" defamatory remarks about Bentley on June 6, 1995. Bunton's admission to Fans at a time near or possibly after Bunton's first defamatory remarks constitutes some evidence that he did not know whether his statements about Bentley were true or not. Further, the long term, repetitive, deliberate attacks demonstrate that Bunton entertained ill will toward Bentley; this constituted probative evidence that Bunton published the defamatory information either knowing of its falsity or with reckless disregard of its truth or falsity. See Jacobs, 736 S.W.2d at 140. Accordingly, as the record includes more than a scintilla of evidence of the existence of actual malice, the trial court did not err in denying Bunton's motion for judgment notwithstanding the verdict. Mancorp, 802 S.W.2d at 228. See ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997).

[27] Bunton's factual sufficiency complaint also fails. Because at trial Bunton emphatically stated that all of his statements about Bentley were true, Farris's testimony that, in the summer of 1995, Bunton told him that he had no harmful information about Bentley, constitutes conflicting evidence. Further, Bunton denied making the comments with malice. Due to the existence of conflicting evidence, we regard the jury's verdict on this issue to be conclusive. See Beall, 867 S.W.2d at 795-96. We hold that actual malice was established by clear and convincing evidence. The evidence is factually sufficient to support the jury's actual malice finding. We overrule Bunton's first and third issues.

[28] BUNTON'S DEFENSE

[29] In his second issue, Bunton contends the trial court should have rendered judgment in his favor because Bentley failed to prove that any statement Bunton made was false. Bunton named nine bases for believing that Bentley is corrupt and a criminal. In each situation, Bunton asserted that Bentley violated the Code of Judicial Conduct or committed the crime of abuse of official capacity, thereby making him corrupt and a criminal.

[30] Truth of the defamatory statements is an affirmative defense. Jacobs, 736 S.W.2d at 140. The burden of proving truth is on the defendant. Id.

[31] Four of Bunton's complaints involve defendants who appeared in Bentley's court. In three of these cases, the evidence shows that Bentley made mistakes of law. The cases continued through the justice system and the mistakes were rectified as contemplated by the system. There was no evidence of any wrongdoing on Bentley's part in these cases. In the fourth of these cases, Bunton's complaint centers on the State's motion to adjudicate, which was filed but never heard or ruled on by Bentley. The evidence shows that the motion was not set for a hearing because the prosecuting attorney, after discussions with the defendant's attorney and probation officer, agreed to continue the defendant on probation and imposed new probationary terms. As the prosecutor did not intend to press for adjudication, there was no occasion for a hearing. Again, there was no showing of any wrongdoing on Bentley's part.

[32] Bunton asserted that Bentley failed to uphold the law because he did not force the sheriff to arrest and jail an accused after an arrest warrant was issued for him. The charges against the accused were not pending in Bentley's court. Trial court jurisdiction is comprised of the power of the court over the subject matter of the case coupled with personal jurisdiction over the accused. Fontenot v. State, 932 S.W.2d 185, 190 (Tex. App.--Fort Worth 1996, no writ). Criminal jurisdiction over the person requires the due return of a felony indictment, or the accused's personal affirmative waiver thereof and the return of a valid information upon complaint. Lackey v. State, 574 S.W.2d 97, 100 (Tex. Cr. App. [Panel Op.] 1978). Judicial action without jurisdiction is void. Fontenot, 932 S.W.2d at 190. The jurisdiction of Bentley's court had not been invoked in this case. Therefore, Bentley had no authority to enforce the warrant. Further, the District Attorney recalled the warrant.

[33] Bunton also complained that Bentley took no action with regard to two removal petitions Bunton filed against Anderson County District Attorney Jeff Herrington. Bunton's complaints against Herrington were investigated by a special prosecutor and heard and dismissed by judges other than Bentley. Bunton contends that the judges who dismissed the petitions violated the law, that Bentley knew that, and should have reported them. The special prosecutor testified that she found no wrongdoing by Bentley. Further, even assuming the other judges involved did not follow the law in handling the petitions, a district judge is under no duty to ensure compliance with the statutes by other judges.

[34] In another complaint, Bunton asserts that Bentley should have taken action to require the District Attorney to comply with statutes requiring him to deposit certain funds in the county treasury. Bunton argues that Bentley, as a District Judge with supervisory responsibility over the Commissioners Court, should have obtained audits and made certain that the funds were deposited properly. The Texas Code of Criminal Procedure requires the District Attorney to deposit into the county treasury all fees collected in connection with bad checks and money obtained through forfeiture proceedings. See TEX. CODE CRIM. PROC. ANN. arts. 102.007 and 59.06 (Vernon Supp. 1999). It appears that the District Attorney was not in compliance with the applicable statutes for some years in the early 1990's. Article five, section eight of the Texas Constitution and section 24.020 of the Texas Government Code vest district courts with appellate jurisdiction and general supervisory control over commissioners courts. See TEX. CONST. art. V, § 8; TEX. GOV'T CODE ANN. § 24.020 (Vernon 1988). The power contemplated, however, is little more than the authority to judicially review improper acts presented by a suit, mandamus, or like proceeding. Tabor v. Hogan, 955 S.W.2d 894, 896 (Tex. App.--Amarillo 1997, no writ). Neither proviso authorizes a district court to sit as the head of the commissioners court and thereby direct its actions. Id. No proceeding was ever instituted in Bentley's court, or any other court apparently, to obtain compliance with the statutes. Accordingly, it was not Bentley's responsibility to sua sponte obtain the District Attorney's compliance.

[35] Finally, Bunton complained that Bentley made campaign contributions to two county judge candidates after a primary but before the November election. Bunton contends this action violated the Code of Judicial Conduct's requirement that judges refrain from endorsing candidates for public office.

See TEX. CODE JUD. CONDUCT, Canon 5(3), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (Vernon 1998). Bentley's campaign treasurer testified that he called the Secretary of State's office to determine whether the contributions would be inappropriate and was told it would not be improper. There is nothing in the record to show that the Commission on Judicial Conduct reviewed this issue. Even assuming that Bentley did violate Canon 5, he did not do so flagrantly. He believed he had appropriate approval. We determine that this possible instance of questionable behavior does not suggest that he is corrupt.

[36] Because we find that none of Bunton's bases for calling Bentley corrupt or a criminal support his allegations, Bunton's truth defense must fail. Accordingly, we overrule Bunton's second issue.

[37] BUNTON'S DAMAGES

[38] In his fourth issue, Bunton briefly contends that the evidence is not legally or factually sufficient to support the jury's award of $7,150,000 in actual damages. Alternatively, Bunton asserts that the award is excessive. Bunton argues that Bentley's evidence did not prove there had been "substantial disruption of his daily routine." Further, Bunton asserts that there is no evidence of any damage to Bentley's reputation.

[39] Applicable Law

[40] Damages recoverable in a slander case include compensation for injuries to reputation or character, mental anguish and other like wrongs incapable of money valuation. Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 922 (Tex. App.--Corpus Christi 1991, writ dism'd w.o.j.). When the slander relates to the professional dealings of the plaintiff, and thus is slander per se, no independent proof of damage to the plaintiffs reputation or of mental anguish is required, as the slander itself gives rise to a presumption of these damages. Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 374 (Tex. 1984). The damages resulting from slander are purely personal and cannot be measured by any fixed standard or rule. Jacobs, 736 S.W.2d at 142. The nature of the injury adds to the uncertainty. Mental anguish has been characterized as a high degree of mental suffering. Outlet Co. v. International Sec. Group, Inc., 693 S.W.2d 621, 629 (Tex. App.--San Antonio 1985, writ ref'd n.r.e). It must be more than worry, vexation, anger or embarrassment. Id.

[41] The amount to be awarded as damages in a slander case rests largely in the discretion of the jury. Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 527 (Tex. App.--San Antonio 1996, writ denied) (on reh'g). In fixing the amount, the jury may consider the motives of the defendant, and the mode and extent of publication. A.H. Belo v. Wren, 63 Tex. 686, 727-28 (1884). We review the sufficiency of the evidence supporting an award of damages by the same standards as any factual question. The duty of this Court is to examine all the evidence and determine if the damages found by the jury are so against the evidence, or unsupported by evidence, as to be manifestly unjust. Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986).

[42] Discussion

[43] Bentley testified that he has suffered. He said the Appellants ruined time with his family and friends and put a cloud over his home and four children. He testified that his name is of critical importance to him and, as a judge, he needs to maintain his integrity and undertake to be a virtuous man. He stated that the defendants' actions hurt and disrupted his family. He also stated that since these attacks began he does not attend to family duties appropriately. He explained that many times he has sulked and worried when he should have been taking care of his family. He testified that the defendants' actions have affected his family's ability to enjoy each other. He also agreed, however, that there has been no disruption in his ability to perform as a judge, teach at a community college, and participate in community organizations and social activities. Bentley also testified that he has incurred no medical, psychiatric, psychological, therapeutic, or counseling expenses as a result of defendants' slander.

[44] Carol Bentley, Judge Bentley's wife, described the situation created by the Appellants' slander as stressful and a "tragedy." She testified that it had ruined her husband's life and her children's lives. She explained that other kids laugh and joke about it to their children. She stated that her husband does not sleep. She testified that the defendants' slander took away Bentley's honor and integrity. She said his life will never be the same. One friend of Bentley's, Elton Bomer, testified that this case has made Bentley downcast, sad, and depressed. Another friend, Cliff Johnson, stated that the slander had a

severe effect on Bentley and his family.

[45] The jury awarded Bentley $100,000 for damages to his character and reputation that he suffered in the past, $50,000 for damages to his character and reputation that he probably will suffer in the future, $7,000,000 for past mental anguish, and zero for probable future mental anguish. Thus, Bentley's mental anguish in the past constitutes most of the actual damages found by the jury.

[46] Mental anguish damages are purely personal and are not measured by any fixed standard or rule. See Jacobs, 736 S.W.2d at 142. Thus, the lack of a specific guide for such damage prevents us from making a clear determination that the past mental anguish should not exceed a certain level of recovery.

[47] The evidence showed that Bentley committed his entire professional life to public service primarily as a judicial officer which the evidence showed to require untainted character and the highest integrity. Retention of his office depends upon the continued confidence in and approval of his reputation by the Anderson and Cherokee counties' electorate. The evidence further indicated that Bentley's reputation had been unsullied throughout his extended career. In June 1995, the slanderous statements and discussions commenced and were repeated often on numerous programs. The campaign against Bentley was staged over the period of a year and a half, broadcast to the public via local television. The untrue remarks were direct attacks upon Bentley's character including charges

of criminality. The jury was required to gauge the effect of these assaults upon Bentley's mental well-being.

[48] The jury, not a reviewing court, is peculiarly equipped to make the damage assessments. See Clancy, 705 S.W.2d at 826. The jury observed Bentley throughout the trial. The jury observed Bentley as he testified and his responses to cross-examination. The jury observed the other witnesses as they testified about the effects of the repeated character attacks upon him. There is nothing in the record to suggest that the jury was guided by anything other than a conscientious consideration of the evidence and the instructions of the trial court. We conclude that the evidence is legally and factually sufficient to support the jury's award of $7,150,000 in actual damages assessed against Bunton. We overrule Bunton's and Gates's fourth issue.

[49] GATES'S LIABILITY FOR DEFAMATION

[50] In his first issue, Gates asserts that the trial court erred in failing to render judgment for him as a matter of law on Bentley's defamation claim. He contends Bentley failed to offer any evidence that he made or published any defamatory statements about Bentley and that there is no evidence that any statement made by Gates about Bentley was false or that it was anything other than Gates's opinion. He also asserts that there is no evidence that any statement was made with actual malice.

[51] Standard of Review

[52] A directed or instructed verdict is proper when the evidence offered on a cause of action is insufficient to raise an issue of fact. Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978). In reviewing the denial of a directed verdict, we review the evidence in the light most favorable to the nonmovant, disregarding all evidence to the contrary. Id. The trial court is to determine whether any evidence of probative force exists to raise fact issues on the material questions presented in the case. Gonzales v. Hearst Corp., 930 S.W.2d 275, 277 (Tex. App.--Houston [14th Dist.] 1996, no writ). When the evidence raises a material issue of fact, or when reasonable minds may differ as to the truth of the controlling facts, an instructed verdict is not warranted, and it would be error for the trial court to instruct a verdict. Id. at 278. If there is any conflicting evidence of probative value, an instructed verdict is improper and the issue must go to the jury. White v. Southwestern Bell Tel. Co., 651 S.W.2d 260, 262 (Tex. 1983).

[53] Applicable Law

[54] Slander is a defamatory statement orally communicated or published to a third person without legal excuse. Simmons, 920 S.W.2d at 444. Public officials must establish a higher degree of fault than private individuals to recover for defamation. Dolcefino, 987 S.W.2d at 110. To sustain a defamation cause of action, a public official must prove that the defendant published a statement that was defamatory concerning the public official, and that the false

statement was made with actual malice. Id. A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. Campbell, 960 S.W.2d at 725. Statements are slanderous per se if they affect a person injuriously in his office, profession, or occupation. Simmons, 920 S.W.2d at 451. Whether the words are reasonably capable of the defamatory meaning the plaintiff attributes to them is a question of law for the trial court. Carr, 776 S.W.2d at 570. Allegedly slanderous statements must be construed as a whole, in light of surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement. Campbell, 960 S.W.2d at 725. Only when the court determines the complained-of language to be ambiguous or of doubtful import should a jury be permitted to determine the statement's meaning and the effect the statement has upon the ordinary listener. Musser v. Smith Protective Servs., Inc., 723 S.W.2d 653, 655 (Tex. 1987).

[55] Discussion

[56] In his motion for instructed verdict, Gates argued that he did not publish any defamatory statements concerning Bentley. He asserted that the evidence shows only Bunton made allegedly defamatory statements. Gates also contended that he made no statement about Bentley with actual malice. On appeal, Bentley responds that Gates aided, abetted, encouraged, ratified, and adopted Bunton's defamatory statements. He further asserts that Gates published as his own Bunton's allegations of corruption. Bentley does not identify any specific defamatory statement made by Gates.

[57] Bentley complains of statements made on Q & A over a time period beginning June 6, 1995 and ending in December of 1996. Gates was not associated with the program in June 1995. He began volunteering as a host or co-host after July 11, 1995. In addition to acting as host, he also helped pay the phone bills. The record also shows that Gates had printed and gave business cards printed with his name and the name of the program, Q & A.

[58] Bentley presented two video tapes containing excerpts of Q & A programs airing between June 1995 and December 1996. A large portion of the longer tape contains clips of shows that aired in June 1995. The majority of the excerpts of the two exhibits shows Bunton, as host of the program, explaining that he believes Bentley and others in local county government are corrupt. Gates appears as co-host in several of the excerpts. In four instances, Gates appears to be listening and/or reading from a paper he is holding. In other excerpts, he takes a more active role.

[59] In one clip, Bunton talks to a caller and says that the district attorney is the most corrupt. Gates tries to tell him he had misspoken. Bunton says Bentley is the most corrupt and Gates replies "yeah." In another clip, Gates helps explain the contents of a fax they had received regarding new rules the district judges had recently instituted. Then, Bunton again begins talking about one of the reasons he feels Bentley is corrupt and Gates resumes his listening mode. In another excerpt, Gates is explaining to Bunton that Bentley violated the law in some regard. He uses his hands and appears very

intense. Another excerpt shows Bunton, Gates, and a third man, not a party to this appeal; Bunton states that "we have talked" and "we" are going to establish the Bentley Hot Line. At the bottom of the screen are the words BENTLEY HOT LINE followed by a telephone number.

[60] In one excerpt, only Gates and a woman not a party to this appeal are on screen. Gates talks about a conversation he had with Bentley. Gates states that Bentley told him "it was a dangerous game we play." Gates responded, "I don't know who is playing games and I don't play games." In another clip, Gates is apparently explaining where Bentley's office is. In the final clip portraying Gates's participation, Bunton is saying that Bentley is corrupt and listing the bases for that statement. Gates is listening and then adds to Bunton's list, helping him name the bases for his conclusion that Bentley was corrupt.

[61] In reviewing the trial court's denial of Gates's motion for instructed verdict, we will review the record in the light most favorable to Bentley, disregarding all contrary evidence and inferences. See Collora, 574 S.W.2d at 68. Our review of the record shows that Gates was involved in the production of Q & A during the majority of the time period during which Bentley was a major topic of discussion and appeared on camera as a participant during some of the shows. Gates appeared to agree with Bunton when he said Bentley was corrupt, encouraged Bunton's comments, and, once, helped him list Bunton's reasons for those comments. Nothing Gates said, however, could tend to injure Bentley's reputation, or expose him to public hatred, contempt, ridicule, or financial injury. In short, the evidence shows that Gates did not make or publish any defamatory statements. See Campbell, 960 S.W.2d

at 725. Although this Court does not condone Gates's acquiescence to Bunton's acts of defamation, the evidence offered is insufficient to raise an issue of fact that Gates defamed Bentley. Because there is no conflicting evidence on the issue of whether Gates made or published a defamatory statement that Bentley was "corrupt" or a "criminal," Gates was entitled to judgment as a matter of law on Bentley's defamation cause of action, and the trial court erred in denying Gates's motion for instructed verdict. See White, 651 S.W.2d at 262. Accordingly, we sustain Gates's first issue.

[62] JURY CHARGE

[63] In his second issue, Gates contends that the trial court erred in the manner in which it submitted questions one, two, three, and seven. Gates asserts that the trial court erred by submitting these liability questions as they were based on his agreement with Bunton's defamatory statements rather than on whether Gates himself made any defamatory statements. He complains the charge did not allow the jury to make a finding as to each element of defamation. He contends that the charge as given improperly allowed the jury to find him liable for damages based on his agreement with Bunton's statements, rather than on his own publication of defamatory statements. He argues that these charge defects constitute a complete omission of a defamation claim against Gates.

[64] Questions one, two, and three concerned Gates's liability for defamation. Question seven asked the jury whether Gates acted with malice and was based on an affirmative

answer to question three. Our determination that the trial court should have granted Gates's motion for instructed verdict on Bentley's defamation cause of action made submission of questions one, two, and three improper. It follows that question seven was also improper. See Musser, 723 S.W.2d at 655. Accordingly, the findings thereon must be disregarded. Necessarily, the jury's award of actual damages against Gates in question nine is also improper and must be disregarded. To the extent discussed, we sustain Gates's second issue. We need not reach the remaining arguments under this issue. See TEX. R. App. P. 47.1.

[65] JOINT AND SEVERAL LIABILITY

[66] Bentley contends in one cross-point that the trial court erred in failing to include in the judgment a decree that Bunton and Gates, as co-conspirators, are jointly and severally liable for the actual damages awarded against Bunton.

[67] Applicable Law

[68] An actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983). Once a civil conspiracy is found, each co-conspirator is responsible for the action of any of the co-conspirators which is in furtherance of the unlawful combination. Akin v. Dahl, 661 S.W.2d 917,

921 (Tex. 1983), cert. denied, 466 U.S. 938, 80 L. Ed. 2d 460, 104 S. Ct. 1911 (1984). Each element of the cause of action of defamation is imputed to each co-conspirator. See id. The concept of civil conspiracy is used, then, to extend liability in tort beyond the active wrongdoer to those who have merely planned, assisted, or encouraged his acts. Carroll v. Timmers Chevrolet, Inc., 592 S.W.2d 922, 925-26 (Tex. 1979). A finding of civil conspiracy imposes joint and several liability on all co-conspirators for any actual damages resulting from the acts in furtherance of the conspiracy. Hart v. Moore, 952 S.W.2d 90, 98 (Tex. App.--Amarillo 1997, writ denied).

[69] Proof of a civil conspiracy is not, in and of itself, a recoverable harm. Belz v. Belz, 667 S.W.2d 240, 243 (Tex. App.--Dallas 1984, writ ref d n.r.e.). "The gist of a civil conspiracy is the damage resulting from commission of a wrong which injures another, and not the conspiracy itself." Schlumberger Well Surveying Corp. v. Nortex Oil and Gas Corp., 435 S.W.2d 854, 856 (Tex. 1968). Any finding of conspiracy must be based on some underlying tort. Schoellkopf v. Pledger, 778 S.W.2d 897, 900 (Tex. App.--Dallas 1989, writ denied). It follows that in order to recover a judgment for civil conspiracy there must be a finding of damages resulting from that conspiracy. Belz, 667 S.W.2d at 243.

[70] Discussion

[71] The jury was asked in Question 5: Did Joe Ed Bunton and Jackie Gates enter into a civil conspiracy to publish defamatory statements about Bascom Bentley?

[72] A "civil conspiracy" is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. To establish a civil conspiracy, there must be an agreement on the object or course of action and one or more unlawful, overt acts in furtherance of that object. The agreement need not be formal, the understanding may be tacit, and each conspirator need not know the details of the conspiracy.

[73] Answer: Yes Neither Bunton nor Gates has attacked this finding on appeal. We are bound by unchallenged jury findings. McGalliard v. Kuhlmann, 722 S.W.2d 694, 696 (Tex. 1986). Bunton was found to have made defamatory statements with actual malice. The jury having found that a civil conspiracy existed, all elements of defamation are imputed to Gates and Gates became responsible for all actions by Bunton during the conspiracy. See Akin, 661 S.W.2d at 921.

[74] In four separate questions, the jury was asked to determine the amount of actual damages and exemplary damages for which Bunton and Gates should each be liable. The jury, however, was not asked to determine what damages are attributable to the conspiracy. At the charge conference, Bentley objected to question nine, which inquires as to the amount of actual damages for which Gates should be held liable. His stated reason for the objection was that "the question does not take into account the joint and several liability rule of active participation set forth in Belo vs. Fuller." *fn3 The record indicates that he presented the court with requested instructions and questions and the court overruled all

of his objections. Bentley's requested instructions and questions, however, are not included in the appellate record.

[75] The Texas Rules of Civil Procedure require a party objecting to a charge to point out distinctly the objectionable matter and the grounds for the objection. TEX. R. CIV. P. 274. Rule 278 requires that a requested instruction, definition, or question be tendered in writing and in substantially correct form prior to submission of the charge to the jury. TEX. R. CIV. P. 278. Where the requested question is relied on by the requesting party, an objection and a written request for submission in substantially correct form is required to preserve error. J & C Drilling Co. v. Salaiz, 866 S.W.2d 632, 636 (Tex. App.--San Antonio 1993, no writ); Wright Way Constr. Co. v. Harlingen Mall Co., 799 S.W.2d 415, 419 (Tex. App.--Corpus Christi 1990, writ denied).

[76] In order to be entitled to judgment for joint and several liability, Bentley was required to secure a jury finding on the amount of damages he suffered as a result of the conspiracy itself. See Belz, 667 S.W.2d at 243. The conspiracy did not commence until Gates began his participation in the program, that is, after July 11, 1995. The damages found by the jury against Bunton were not appropriate as against Gates because many of the defamatory acts occurred prior to Gates's involvement in the Q & A program. Bentley asserts that Gates ratified Bunton's conduct prior to the conspiracy. There is no evidence that Gates ratified any of Bunton's conduct occurring prior to his participation in the presentations. There is no evidence that he knew what Bunton had said at any time prior to July 11 or that he intended to give validity to Bunton's earlier acts as required for a ratification. See Motel Enters., Inc.

v. Nobani, 784 S.W.2d 545, 547 (Tex. App.--Houston [1st Dist.] 1990, no writ) (on reh'g). Therefore, a damage finding related to the conspiracy to defame was required.

[77] Bentley raised the issue of joint and several liability at the charge conference, and properly objected to some questions because they did "not take into account the joint and several liability rule." Our record, however, does not include Bentley's requested questions for the jury. The record before us does not show that Bentley requested a damage question on the conspiracy issue in substantially correct form. Accordingly, while the unchallenged finding of civil conspiracy stands, Bentley has waived his complaint that the trial court erred in not imposing joint and several liability on Bunton and Gates. See Fairfield Estates L.P. v. Griffin, 986 S.W.2d 719, 724 (Tex. App.--Eastland 1999, no writ) (where record did not contain written request, complaint was waived); Hart, 952 S.W.2d at 94 (where record shows no objection or request of appropriate instructions and questions, any error is waived); Connors v. Connors, 796 S.W.2d 233, 236 (Tex. App.-- Fort Worth 1990, writ denied) (appellant's complaint without merit where the record contains no requested questions or instructions). We overrule Bentley's cross-point.

[78] GATES'S EXEMPLARY DAMAGES

[79] In his third issue, among numerous other arguments, Gates asserts that, because there is no basis for awarding actual damages against him, the award of exemplary damages is improper. We agree.

[80] Exemplary damages are not recoverable absent an award of actual damages. Nabours v. Longview Savs. & Loan Ass'n, 700 S.W.2d 901, 904 (Tex. 1985). In the absence of a finding of damages suffered as a result of the conspiracy, Gates cannot be held liable for the damages caused by the publication of Bunton's defamatory statements. Therefore, Bentley cannot recover exemplary damages from Gates. To the extent addressed, we sustain Gates's third issue. We need not reach Gate's remaining arguments under this issue. See TEX. R. APP. P. 47.1.

[81] CONCLUSION

[82] We affirm the trial court's judgment as to Bunton's liability for defamation. Accordingly, we affirm that portion of the trial court's judgment ordering Bunton to pay $7,150,000 in actual damages. We affirm that portion of the trial court's judgment ordering Bunton to pay $1,000,000 in exemplary damages; Bunton makes no complaint of that portion of the judgment on appeal. We reverse the portion of the judgment allowing Bentley to recover actual and exemplary damages from Gates and render judgment that Bentley take nothing on his cause of action against Gates.

[83] TOM B. RAMEY, JR., Chief Justice

Opinion Footnotes

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[84] *fn1 Bentley also sued several other individuals who were associated with the show. The suits against those defendants were dismissed and they are not parties to this appeal.

[85] *fn2 Bunton is before this Court pro se. We are obligated to liberally construe briefs and the points therein. Anderson v. Gilbert, 897 S.W.2d 783, 784 (Tex. 1995).

[86] *fn3 Belo involved a libel suit against a corporation and its stockholders. The court held that if a corporation, by its wrongful acts, injures an individual, it is liable and those who aid and assist in the wrongful act are equally responsible. Belo v. Fuller, 84 Tex. 450, 19 S.W. 616, 617 (1892). This case did not discuss how the issues should be presented to the jury.

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APPENDIX H. Plaintiff's Fourth Amended Original Petition 1996

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ANDERSON COUNTY, TX

BASCOM W. BENTLEY, III	§	IN THE THIRD
	§	JUDICIAL DISTRICT
	§	COURT
vs.	§	OF
	§	
JOE ED BUNTON, JACKIE GATES, JESSE RAMSEY, JERRY MOORE, SHERRY MUNSINGER, MARY FAULKNER, AND MARY ANN VIRGADAMO	§	ANDERSON COUNTY, TEXAS

PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes BASCOM W. BENTLEY, III, hereinafter

called Plaintiff, and files this Fourth Amended Original Petition complaining of JOE ED BUNTON, JACKIE GATES, JESSE RAMSEY, JERRY MOORE, SHERRY MUNSINGER, MARY FAULKNER, and MARY ANN VIRGADAMO and for cause of action would respectfully show unto the Court the following:

I.

Parties

Plaintiff BASCOM W. BENTLEY, III is a resident of Anderson, County, Texas.

Defendant, JOE ED BUNTON, is an individual residing in Anderson County, Texas, and has been properly served and answered herein.

Defendant, JACKIE GATES, is an individual residing in Anderson County, Texas, and has been properly served and answered herein.

Defendant, JESSE RAMSEY, is an individual residing in Anderson County, Texas, and has been properly served and answered herein.

Defendant, SHERRY MUNSINGER, is an individual residing in Anderson County, Texas, and has been properly served and answered herein.

Defendant, JERRY MOORE, is an individual residing in Anderson County, Texas, and has

been properly served and answered herein.

Defendant, MARY FAULKNER, is an individual residing in Anderson County, Texas, and has

been properly served and answered herein.

Defendant, MARY ANN VIRGADAMO, is an individual residing in Anderson County, Texas, and has been properly

served and answered herein.

Further Defendants will be named as discovery proceeds.

II.

Factual Background

The Plaintiff is a state District Judge who presides in Anderson County, Texas. Defendant Bunton has, on numerous occasion, used his position as the anchor/host of a local cable television program entitled "Q & A" to publish false and derogatory statements about the Plaintiff to the large portion of the population of Anderson County that watches the program, and in the process has intentionally inflicted emotion distress on him. "Q & A" is produced by Defendants Bunton and Ramsey, hosted by Defendants Bunton, Ramsey, and Munsinger and directed by Defendant Moore. All of the Defendants participate in the production of "Q & A". These defamatory and intentional statements have injured the Plaintiff's reputation, questioned the Plaintiff's honesty, integrity and virtue, accused the Plaintiff of neglect and corruption with respect to his occupation as a District Judge, and accused the Plaintiff of criminal activity. Defendants, JACKIE GATES, JESSE RAMSEY, JERRY MOORE, SHERRY MUNSINGER, MARY FAULKNER and MARY ANN VIRGADAMO by their participation in the production of "Q & A" , have likewise defamed and intended to inflict emotional distress on Plaintiff. Defendants Gates, Ramsey, Moore, Munsinger Faulkner and Virgadamo have adopted and ratified the defamatory and injurious statements made by Defendant Bunton. The conduct of these Defendants have been directed at the community in general, including various Anderson County businesses and courthouse personnel.

III.

The Defamatory and Tortious Statements

The following are examples of the defamatory and tortious statements (which amount to intentional infliction of emotional distress) that the Defendant has published.

1. On the June 27, 1995, airing of Q & A, the Defendant posed the following "survey question" to his viewers: "Is Judge Bentley corrupt?" The text of this question was superimposed on the television screen throughout a large portion of the program. During the course of that program, the Defendant stated that Judge Bentley was guilty of "cronyism and corruption."

2. On the June 6, 1995, airing of "Q & A," the Defendant engaged in a lengthy tirade about a criminal case with which Judge Bentley was involved. The Defendant stated that Judge Bentley had released a certain probationer on a personal recognizance bond when he had appeared before Judge Bentley on a "Felony motion to revoke [his] probation." The Defendant stated that the probationer's father was, at the time Judge Bentley had released him on a personal recognizance bond, a potential mayoral candidate. The Defendant then criticized Judge Bentley because the case was still pending and had not yet been resolved. The Defendant then posed a rhetorical question to Judge Bentley (who did not appear on the program):

> Is this [case] still pending to influence the young man's father? This makes you look bad. It makes the system look corrupt . . . I do not believe that we have said anything about the justice system in Anderson County that's not true, and you're one of the biggest problems in the lack of justice in Anderson County and you need to do something about it and you need to

clean that case off your docket and quit hanging this over those people's heads.

On the June 27, 1995, program, the Defendant explained that he believed that Judge Bentley had maintained this case on his docket so that he and his "cronies" in the Anderson County justice system could blackmail the young man's father in the event he was elected mayor. The Defendant stated that when Judge Bentley and his "cronies" wanted the mayor to vote a certain way, Judge Bentley would call the mayor and tell him that his son "was looking at being in the state pen" for the rest of his father's life, and that Judge Bentley could use his influence within the justice system to "pick his roommate" and "make sure [his experience in the state penitentiary] is not very pleasant." This clearly accused Judge Bentley of abusing his authority as a judge and attempting to commit official misconduct and blackmail.

3. On the June 6, 1995, program, the Defendant stated that "it's very unheard of from what I'm told to give PR [personal recognizance] bonds or, in a lot of cases, even bonds at all, on felony motions to revoke probation, but in this case Judge Bentley did it." On June 27, 1995, the Defendant stated it in even stronger terms, stating that is was "absolutely unheard of." Thus, the Defendant accused Judge Bentley of abusing his authority for his personal gain.

4. On the June 6, 1995, program, the Defendant falsely accused the Plaintiff of violating the law, purposely failing to uphold the law, covering up the allegedly illegal activities of his political "cronies," and knowingly obstructing justice. The Defendant stated:

Obviously [the sheriff] violated the law. Obviously, we've got District Judges that knew

> about it. Bascom [Bentley], you and [the sheriff] call in and say it ain't true. Say, "Joe Ed, you're lying. You're telling untrue things." I dare you. You're welcome to come in here. You can come out here. You can call in here. The fact of it is y'all are corrupt; y'all are the criminals; y'all are the ones that ought to be in jail.

On June 27, 1995, the Defendant again stated, "Judge Bentley has the power to investigate what [the Sheriff] is doing wrong but, you know, cronyism and corruption." This blatant and false accusation of criminal activity is slander per se.

5. On June 6, 1995, when a caller to "Q&A" complained that a particular defendant had not yet been brought before a Grand Jury, the Defendant replied, "There have been a lot of grand juries, but it just goes back to what's going on at the courthouse with the boys."

6. On June 27, 1995, during a discussion of applying for a writ of mandamus against the City of Palestine, the Defendant implied that the Plaintiff (and the other Anderson County District Judges) would abuse his power and refuse to disinterestedly apply the law in his courtroom, stating, "I know we won't get a favorable ruling with the corrupt judges in the Anderson County Center for Corruption ....This type of cronyism has got to be stopped."

7. On June 20, 1995, the Defendant stated, "If you think there's justice in the Anderson County Courthouse, all I can say to you is you're naive and you just don't know the whole story."

8. On January 30, 1996, the Defendant stated that the Plaintiff is an individual that "Q&A" considers the most corrupt elected official in Anderson County. Out of those four judges, three are on the 'Q&A' top five corrupt elected official list, [Judge Bascom] Bentley is on the top, [Judge] Bournias is on

the bottom and Jerry Calhoun is fourth". He further stated that Plaintiff is "the number one corrupt elected official in Anderson County". In speaking of the Anderson County District Judges, the Defendant stated that they are "so ignorant and incompetent that they don't know their jobs so they can't do their jobs". Defendant went on to state that "Dick Swift is the guy that got us the ultimate corrupt elected official in Anderson Count, Bascom Bentley, " who is "the offensive coordinator for the political wing of the click in my opinion and the most corrupt elected official, and if you don't believe that all you need to do is start digging around the courthouse." In addition to such blatant slander per se, and intentional inflicting of emotional distress, on the same January 30, 1996 program, Defendant accused Judge Bentley of (1) not doing his job, (2) being ignorant and incompetent, and (3) being soft on crime, all in addition to numerous references (including some in addition to those quoted above) to Plaintiff as being "corrupt".

9. Consistent with the above, on February 1, 1996, the Defendant again listed Plaintiff as the person who topped the "'Q&A' top five corrupt elected official list". The Defendant went on to state that "the reason you ought not vote for Dick Swift is that Dick Swift is responsible for creating the Court that Bascom Bentley sits in and he is responsible for getting him the appointment circumventing Governor Clement's choice for that job. . . ." The Defendant further questioned Judge Bentley's ethics regarding campaign contributions, and repeatedly called Plaintiff the "most corrupt elected official" in Anderson County. He stated that Plaintiff has "disgraced the laws of Texas" in his position.

10. On February 6, 1996 airing of "Q&A", the Defendant again repeatedly reiterated that Plaintiff is "the number one most corrupt elected official in Anderson County". He stated that Judge Bentley is "either lazy or grossly incompetent", stated that the Anderson County District Judges "slap drunk drivers on the wrist", engage in favoritism, "have

drug dealers working out of their homes", and again spent time ranting and raving of the accusations contained in paragraph 2 above. Defendant spent a large portion of this particular show directing various accusations of favoritism and inappropriate conduct toward Judge Bentley, intending to slander him and intentionally inflict emotional distress upon him.

11. The Defendant continued his vicious attack on Judge Bentley during the March 7, 1996 edition of "Q&A". At that time, he once again accused Plaintiff of being the number one most corrupt elected official in Anderson County. The Defendant further discussed the "Bascom Bentley Hotline" set up to gather information from any caller that would reflect on Judge Bentley's character.

IV.

The Defendant claims to have undisclosed facts to support his statements.

During the programs on which Defendant Bunton made most or all of these defamatory statements, the Defendant repeatedly stated that he had undisclosed factual documentation that supported his statements. The following are examples of these statements of factual support.

1. On June 27, 1995, the Defendant told his audience, if you don't believe this ....this is all public record and I've got copies of [the police investigation into the probationer who Judge Bentley had released on personal recognizance and other public records allegedly showing that Judge Bentley had improperly delayed resolving the case]. I'll let you copy them."

2. On June 27, 1995, the Defendant told a caller who supported Judge Bentley, "I'd like you to dispute the facts. I'll let you see the documents. He is corrupt."

3. On June 27, 1995, the Defendant stated, "We're

trying to give you what is factual."

4. On June 27, 1995, the Defendant stated, "You look at these records. Judge for yourself. When you see the facts, you'll have only one opinion . My opinion, based on the facts, is that [Judge Bentley] is [corrupt]."

5. On June 20, 1995, the Defendant stated, "I offered Judge Bentley the opportunity to come on this show and tell you what I'm saying is just not true." Thus, the Defendant implied that what he was saying was true and subject to being proved or disproved.

6. On June 20, 1995, the Defendant challenged Judge Bentley and his supporters to "[c]all in and tell me that the files at City Hall are inaccurate."

7. On one occasion, the Defendant stated, "This is the truth. If it's untrue it's on the records of the courthouse."

V.

The Defendants' defamatory statements constitute slander per se (in addition, of course, to intentional infiction of emotional distress) in that they impute to the Plaintiff the commission of a crime and affect the Plaintiff injuriously in his profession as a judge.

The Defendants' statements were false, and the Defendants published them with either the knowledge that they were false or, at the very least, with a reckless disregard for their truth or falsity. Accordingly, Defendants acted with an entire want of care and conscious indifference to the Plaintiff's rights. Such action constitutes malice by the Defendants.

Prior to the malicious publication of these defamatory statements, Plaintiff maintained a reputation of honesty, stability, and trustworthiness in his community. Indeed, he had never before been suspected or accused of corruption or any other dishonesty. Nevertheless, a large number of the citizens of Anderson County viewed the Defendants' programs

and heard their defamatory statements. Consequently, as a direct and proximate result of the Defendants' false and libelous statements, Plaintiff has endured shame, embarrassment, humiliation and mental pain and anguish. Additionally, Plaintiff is and will in the future be seriously injured in his good name and reputation in the community and exposed to the hatred, contempt and ridicule of the general public, as well as of his friends and relatives. The publishing of the statements complained of constitutes defamation on its face, and such statements are actionable pursuant to §73.001 of the Civil Practice and Remedies Code and the common law. Plaintiff, therefore, claims general damages in a sum in excess of the minimum jurisdictional limits of this Court.

The Defendants' publication of the defamatory statements complained of in this petition was done with an entire want of care and was done with conscious indifference to the rights and welfare of the Plaintiff. Plaintiff, therefore, is entitled to recover exemplary damages. Accordingly, Plaintiff sues for exemplary damages in a sum in excess of the minimum jurisdictional limits of this Court.

VI.

On virtually every "Q&A" program that airs live twice a week and is replayed four times a week, Defendants have slandered and defamed Plaintiff, and have intentionally inflicted emotional and resultant physical distress on him. Further, such slanderous and tortious conduct had been conducted for many months prior to the filing of this lawsuit, and has been engaged in continuously since the date of that filing. Both prior and subsequent to the date of that filing, the Defendants have targeted Plaintiff, as specifically described herein. In addition, they have slandered the other Anderson County District Judges, The Anderson County Sheriff, the Anderson County District Attorney, the Anderson County Judge, the Anderson County Commissioners, the Mayor of Palestine, the City Council of Palestine, and numerous other

county, state, and federal officials.

VII.

Defendants' actions also constitute intentional infliction of emotional distress. Defendants have deliberately, intentionally and maliciously attacked Plaintiff and spread these lies about him and in so doing have falsely impugned his character by accusing him of criminal activity and of corruption. Defendants knew that these accusations were false and harmful, or at the very least acted recklessly in making them. Such conduct is so outrageous in character and extreme in degree as to go beyond all possible bounds of decency and to be considered atrocious and utterly intolerable in a civilized society. The Defendants' actions have caused your Plaintiff severe emotional distress, and have proximately caused your Plaintiff to suffer damages compensable under Texas law. The Plaintiff is seeking to recover all of his damages, actual damages and exemplary damages in an amount sufficient to punish these defendants, for all of their actions in defaming the Plaintiff and intentionally inflicting emotional distress on him (in addition to the conspiracy described below) in this case.

VIII.

Each of the Defendants have further engaged in a conspiracy to defame Plaintiff, and in a conspiracy to intentionally inflict emotional distress upon him. Defendants have acted in combination to achieve these unlawful purposes with have been furthered by Defendant Bunton as spokesman for the group.

PRAYER FOR RELIEF

____Plaintiff prays that on final trial the Plaintiff have:

1. Actual damages in a sum in excess of the minimum jurisdictional limits of the Court;

2. Prejudgment interest as provided by law;

3. Exemplary damages in a sum in excess of the

minimum jurisdictional limits of the Court;

4. Postjudgment interest as provided by law;

5. Costs of suit.

6. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

CHANDLER LAW OFFICES

P.O. Box 340
Lufkin, TX 75902-0340

Telephone: 409/632-7778
Telefax: 409/632-1304

By"s/Reich O. Chandler
George Chandler
State Bar No. 04094000

Reich O. Chandler
State Bar No. 00783817

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been properly served upon all parties and/or their counsel in accordance with the Rules of Civil Procedure, on this the 31st day of January, 1997.

s/Reich Chandler"

Reich Chandler

APPENDIX I. Plaintiff's Motion in Limine

MOTION IN LIMINE

20.

That Defendants be prohibited from calling any witness, fact or expert, because the identity, address and substance of testimony has not been timely disclosed to Plaintiff in response to Plaintiff's Interrogatories to Defendants. In this regard, Plaintiff would show that Defendants, in response to Plaintiff's proper interrogatory asking for the "names and addresses of all persons having knowledge of any facts regarding the occurrence(s) made the basis of this suit," failed to identify by name and address any individuals. Defendant Jackie Gates simply answered, without objection, "Parties." See Jackie Gates' Answers to Plaintiff's Interrogatories, Answer No. 2. Defendant Joe Ed Bunton, without objection, listed the names of thirty-two (32) individuals but failed to provide the address of any one of such individuals. See Joe Ed Bunton's Answers to Plaintiff's Interrogatories, Answer No. 2.

The failure to designate a witness as a person with knowledge of relevant facts results in an automatic sanction of excluding that witness' testimony. See Tex. R. Civ. P. 215(5); Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911, 916 (Tex. 1992) (rule requiring exclusion of evidence for failure to respond or supplement response to request for discovery is mandatory). See also Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986) (failure to supplement answer to interrogatories asking for names and addresses of witnesses results in loss of opportunity to offer the witness' testimony, and that sanction is automatic); Braniff, Inc. v. Lenty, 748 S.W.2d 297 (Tex. App. -Fort Worth 1988, writ denied)

(automatic sanction applies when either the identity or location of the person with knowledge of relevant facts is not disclosed). Most importantly, a party must be named in response to an appropriate interrogatory unless there is a showing of good cause. See Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992). The status of an individual as a party, standing alone, is insufficient to establish good cause. Id. Good cause for failure to comply with discovery is not established by unfairness to the offering party, an opponent's lack of surprise, knowledge of the existence of the witness, the fact that the witness has been deposed, or inadvertence of counsel. See Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669 (Tex. 1990); Morrow, 713 S.W.2d at 298, Rankin v. Atwood Vacuum Machine Co., 831 S.W.2d 463, 466-67 (Tex. App.--Houston [14th Dist.] 1992, no writ).

IT IS ORDERED:

"s/JH

SUSTAINED _____ OVERRULED

MODIFIED: *Parties testimony is admissible*

APPENDIX J. Partial Instructed Verdict

PARTIAL INSTRUCTED VERDICT

(Record of Trial page740)

1 the courtroom after you're excused.

2 Thank you very much.

3 (Jury ushered out.)

4 THE COURT: It's the Court's understanding

5 that there's a motion to be presented at this time.

6 MR. WALKER:[Attorney for Bentley] Yes, Your Honor. Plaintiff just

7 has a brief motion for partial instructed verdict.

8 Comes now Plaintiff, after both parties have

9 rested and closed, and makes this motion for partial

10 directed verdict against Defendant Joe Ed Bunton on the

11 issues of defamatory import, publication, and causation

12 of damages, and in support thereof would show:

13 Defendant Bunton has admitted that he

14 intentionally accused Judge Bentley of corruption and

15 criminal conduct on the cable television program

16 and A. These statements are defamatory per se, as

17 was held by Texas Supreme Court in A.H. Belo vs.

18 Looney, 246 5.W.2d 777, and Linedecker and Associates

19 vs. Wector, 683 5.W.2d 368.

Because these statements are defamatory per se, no proof of causation of general damages is required. That's also the Linedecker case. Mental anguish and damages to reputation are general damages presumed to flow from this statement without proof thereof. And that's also the Linedecker case and

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Needer vs. Brooks Fashion Stores Inc., 840 5.W.2d 612.

These are the only elements of damages that Judge Bentley's seeking. Accordingly, these issues have been conclusively established, and should not be submitted to the jury.

That concludes Plaintiff's Motion for Partial Directed Verdict.

THE COURT: All right. Is there any response?

MR. CRIDER: [Attorney for Bunton] Yes, sir. Even -- even if the court accepts that as an admission, his testimony there of the criminal activity, the plaintiff is a public figure and it still must meet the test of New York Times vs. Sullivan. He must meet clear and convincing evidence, and he must establish malice,and under the New York Times standard, malice is deliberately false

or with deliberate disregard -- reckless disregard for the truth.

THE COURT: Let me interrupt you, Mr. Crider. It's my understanding the motion did not go to the malice question. In other words, they're not asking that the Court -- an instructed verdict as to liability or as to - in other words, as I understood the motion, it's not -- it's not saying that If this is granted that there is liability for any damages in the

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absence of a malice finding.

In other words, I think what they're asking is that only -- with respect to Mr. Bunton -- that only the malice question as far as the defamation issue is concerned be -- be submitted, and then the amount of damages, I was told, would still be submitted. So the Court does not understand their motion to be eliminating the requirement that malice be accomplished.

MR. CRIDER: I understand that, but I think that before we get to the damages here, and I understood they wanted to get a partial that he's entitled to damages, I think he's got to get through the malice hurdle, though. If we're getting the preliminaries and getting up against the malice wall, I don't have any problem with their motion.

17 THE COURT: My understanding is that -- and
18 maybe they can clear it up, but my understanding of the
19 motion is what they are saying is that there -- in the
20 event there is recovery, that at least nominal damages
21 are established, but not that they're entitled to that
22 in the absence of a malice finding. That's the Court's
23 understanding. Is there any -
24 MR. CRIDER: That's fine.
25 THE COURT: Is there any response?
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1 MR. CRIDER: As long as I understand that,
2 Your Honor.
3 THE COURT: All right. Thank you very much.
4 Okay. With that understanding of the motion,
5 the court does grant that motion.
6 MR. WALKER: Thank you, Your Honor, and
7 that's a correct understanding of our motion.
8 THE COURT: Thank you very much.
9 Any further motion at this time?
10 MR. DeDIEGO: [Attorney for Gates] Yes, Your Honor. At this time,
11 Defendant Jackie Gates would again move for an
12 instructed verdict on the causes of actions alleged by
13 the plaintiff of intentional infliction of emotional
14 distress and the civil conspiracy.

And, Your Honor, we would reurge that portion of our motion for instructed verdict, as well, on the issue of whether or not Mr. Gates published a defamatory statement and the actual malice requirement as well.

I've discussed it at length the first time I presented the motion. I am more than happy, if the Court would like me to reurge the same grounds again, that we move for the same things on the same grounds at this time, at the close of the defendants' case.

THE COURT: Thank you very much, Counsel.

APPENDIX K. Charge of the Court

No. 37,488

BASCOM W. BENTLEY, III	§	IN THE THIRD JUDICIAL DISTRICT
vs.	§	COURT OF
JOE ED BUNTON, JACKIE GATES, JESSE RAMSEY, JERRY MOORE, SHERRY MUNSINGER, MARY FAULKNER, AND MARY ANN VIRGADAMO	§	ANDERSON COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been

given you. I shall now give you additional instructions which you should carefully and strictly followed during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this court room, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to an answer another

question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of the these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in the sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any are other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance

of the evidence, unless otherwise indicated. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires other than a "Yes" or "No," your answer must be based on a preponderance of the evidence, unless otherwise indicated.*

*NOTE: "unless otherwise indicated" was printed by hand at the end of a type document

Question 1

Do you find that Jackie Gates agreed with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt?

Answer "Yes" or "No."

Answer: YES (10 YES – 2 NO)

==========

If you answered Question 1 "Yes," then you will answer Question 2: otherwise, do not answer Question 2.

Question 2

Did Jackie Gates publish his agreement with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt?

A statement is "published" if it is communicated orally, in writing, or in print to some third person capable of understanding its defamatory import in such a way that he did so understand.

Answer "Yes" or "No."

Answer: YES (12)

==========

If you have answered Question 2 "Yes," the end you will answer Question 3; otherwise, do not answer Question 3.

Question 3

Do you find from clear and convincing evidence that Jackie

Gates acted with actual malice in publishing his agreement with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt?

A defamatory statement is made with "actual malice" if it is made with actual knowledge that it is false or with reckless disregard as to its truth or falsity.

"Reckless disregard as to its truth or falsity" means a high degree of awareness of probable falsity, to and extent that the person publishing the statement entertained serious doubts as to the truth of the publication.

"Clear and convincing evidence" is the measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegation sought to be established.

Answer "Yes" or "No."

Answer: YES (10 YES) (2 NO)

= = = =

disregard as to its truth or falsity.

"Reckless disregard as to its truth or falsity" means a high degree of awareness of probable falsity, to an extent that the person publishing the statement entertained serious doubts as to the truth of the publication.

"Clear and convincing evidence" is the measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No."

Answer: YES (12)

==========

If you have answered either Question 3 or Question 4 "Yes," the end you will answer Question 5; otherwise, do not answer Question 5.

Question 5

Did Joe Ed Bunton and Jackie Gates enter into a civil conspiracy to publish defamatory statements about Bascom Bentley?

A "civil conspiracy" is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. To establish a civil conspiracy, there must be an agreement on the object or course of action

and one or more unlawful, overt acts is furtherance of that object. The agreement need not be formal, the understanding may be tacit, and each conspirator need not know the details of the conspiracy.

Answer "Yes" or "No."

Answer: YES (11 Yes) (1 No)

==========

If you have answered Question 4 "Yes," then you will answer Question 6; otherwise, do not answer Question 6.

Question 6

Do you find that Joe Ed Bunton, in publishing defamatory statements about Bascom Bentley, acted with malice?

"Malice" means a specific intent by the defendant to cause substantial injury to the claimant, or an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involves and extreme degree of risk, considering the probability and magnitude of the potential harm to others, and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No."

Answer: YES (12)

If you have answered Question 3 "Yes," the you will answer Question 7; otherwise, do not answer Question 7.

Question 7

Do you find that Jackie Gates, in publishing his agreement with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt acted with "malice?"

"Malice" means a specific intent by the defendant to cause substantial injury to the claimant, or an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No."

Answer: YES (10 Yes) (2 No)

If you have answered Question 4 "Yes," then you will answer Question 8; otherwise, do not answer Question 8.

Question 8

What sum of money, if paid now in cash would fairly and reasonably compensate Bascom Bentley for mental anguish and the injury he suffered to his character and reputation both in

the past and, in reasonable probability in the future, proximately caused by the publication of Joe Ed Bunton's defamatory statements?

"Proximate cause" means that cause which, in a natural and continuous sequence, produces and event, and without which cause such event would not have occurred. In order to be a proximate cause the act or omissions complained of must be such that a person using ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of an event.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Bascom Bentley because of the publication of the statements in question.

a. Damage to his character and reputation he suffered in the past: $100,000

b. Damage to his character and reputation that he will, in reasonable probability, suffer in the future: $50,000

c. Mental anguish he suffered in the past: $7,000,000

d. Mental anguish that he will, in reasonable probability, suffer in the future: 0

==========

If you have answered Question 3 "Yes," then you will answer Question 9; otherwise, do not answer Question 9.

Question 9

What sum of money, if paid now in cash, would fairly and reasonably compensate Bascom Bentley for mental anguish and the injury he suffered to his character and reputation, both in the past and, in reasonable probability in the future, proximately caused by the publication of Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt which Jackie Gates published his agreement with?

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omissions complained of must be such that a person using ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of an event.

"Mental anguish" means the emotional plain, torment, and suffering experienced by Bascom Bentley because of the publication of the statements in question.

a. Damage to his character and reputation he suffered in the past: $25,000

b. Damage to his character and reputation that he will, in reasonable probability, suffer in the future: 0

c. Mental anguish he suffered in the past: $70,000

d. Mental anguish that he will, in reasonable

probability, suffer in the future: 0

==========

If you have answered Question 6 "Yes," then you will answer Question 10; otherwise, do not answer Question 10.

Question 10

What sum of money, if any, should be assessed against Joe Ed Bunton and awarded to Bascom Bentley as exemplary damages for the publication by Joe Ed Bunton of defamatory statements concerning Bascom Bentley?

"Exemplary damages" means an amount: that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Factors to consider in awarding exemplary damages, if any, are - --

a. the nature of the wrong.

b. the character of the conduct involved.

c. the degree of culpability of the wrongdoer.

d. the situations and sensibilities of the parties involved.

e. the extent to which such conduct of offends a public sense of justice and propriety.

f. compensation for inconvenience.

g. the frequency of the wrongs committed.

Answer in dollars and cents, if any. $1,000,000.00

==========

If you have answered Question 7 "Yes," then you will answer Question 11; otherwise, do not answer Question 11.

Question 11

What sum of money, if any, should be assessed against Jackie Gates and awarded to Bascom Bentley as exemplary damages for Gates' publication of his agreement with Joe Ed Bunton's f defamatory statements concerning corruption on the part of Bascom Bentley?

"Exemplary damages" means an amount: that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Factors to consider in awarding exemplary damages, if any, are – --

a. the nature of the wrong.

b. the character of the conduct involved.

c. the degree of culpability of the wrongdoer.

d. the situations and sensibilities of the parties involved.

e. the extent to which such conduct of offends a public sense of justice and propriety.

f. compensation for inconvenience.

g. the frequency of the wrongs committed.

Answer in dollars and cents, if any. $50,000

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answer to the questions asked.

It is the duty of the presiding juror – --

1. To preside during your deliberations;
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;
4. To vote on the questions;
5. To write your answers to the questions in the spaces provided; and
6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are

required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/

JUDGE PRESIDING

APPENDIX L. Trial Court's FINAL JUDGEMENT

FILED FOR RECORD
97 AUG 1 AM 8:49
MAXINE BARRNETTE
DISTRICT CLERK

No. 37,488

BASCOM W. BENTLEY, III	§	IN THE DISTRICT
	§	COURT OF
vs.	§	
	§	
JOE ED BUNTON,	§	
JACKIE GATES	§	
JESSE RAMSEY,	§	ANDERSON COUNTY,
JERRY MOORE,	§	TEXAS
SHERRY MUNSINGER,	§	
MARY FAULKNER,	§	3rd JUDICIAL
MARY ANN	§	
VIRGADAMO	§	DISTRICT

FINAL JUDGEMENT

BE IT REMEMBERED that on February 10, 1997, this case was called for trial before the Honorable John Hill, Judge presiding. The Plaintiff appeared in person and by and through his attorneys of record, and the Defendants appeared in person

and by and through their attorneys of record. All announced ready for trial. The case proceeded to trial before a jury consisting of twelve good and lawful jurors.

At the conclusion of the Plaintiff's case in chief, the Court granted instructed verdicts in favor of Defendants Jesse Ramsey, Jerry Moore, Sherry Munsinger, Mary Faulkner, and Mary Ann Virgadamo.

At the conclusion of all the evidence, the Court granted Plaintiff's motion for partial directed verdict and ruled as a matter of law that Defendant Joe Ed Bunton had published false and defamatory statements about Plaintiff Bascom W. Bentley by accusing him of being corrupt and a criminal. The Court then submitted the remainder of the case to the jury by jury questions. The jury answered the questions by the verdict of ten jurors. The verdict is incorporated into this judgement.

The verdict of the jury is for the Plaintiff and against Defendants Joe Ed Bunton and Jackie Gates, and the Court finds that judgment should be rendered upon the verdict in favor of the Plaintiff and against Defendants Joe Ed Bunton and Jackie Gates.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff Bascom W. Bentley, III, have and recover from Defendant Joe Ed Bunton as actual damages the sum of $7,150,000.00.

IT IS FURTHER ORDERED that Plaintiff Bascom W. Bentley, III, have and recover from Defendant Joe Ed Bunton as exemplary damages the sum of $1,000,000.00.

IT IS FURTHER ORDERED that Plaintiff Bascom W. Bentley, III, have and recover from Defendant Jackie Gates as actual damages the sum of $95,000.00.

IT IS FURTHER ORDERED that Plaintiff Bascom W. Bentley, III, have and recover from Defendant Jackie Gates as exemplary damages the sum of $50,000.00.

Pre-Judgement Interest

The Court finds that Plaintiff filed his Original Petition in this cause against Defendants Bunton and Gates on February 9, 1995, and that the appropriate rate of prejudgment interest is 10% simple interest. It is further ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover from Defendant Joe Ed Bunton as prejudgement interest the additional sum of *$1,410,410.40* and from Defendant Jackie Gates as pre-judgement interest the additional sum of *$18,739.72*.

Post-Judgment Interest

___It is further, ORDERED, ADJUDGED AND DECREED that this judgment, in the sum total amount of *$9,560,410.40* as against Defendant Joe Ed Bunton and in the sum total amount of *$163,739.72* as against Defendant Jackie Gates, plus taxable court costs, shall bear post-judgement interest at the rate of 10%, compounded annually, beginning on the date this judgement is signed, and ending on the day the judgment is fully paid.

All costs of Court expended or incurred in this cause are hereby assessed against Defendants Joe Ed Bunton and Jackie Gates, jointly and severally.

All writs and processes for the enforcement and the collection of this judgement and costs of Court may henceforth issue as necessary.

All other relief not expressly granted herein is denied.

SIGNED this 29 day of July, 1997.

"S/John Hill"

HONORABLE JOHN HILL
JUDGE PRESIDING

APPENDIX M. Congressional Act of Jan. 20, 1840, 2 H. Gammel, Laws of Texas, Vol. 2 177 (1840)

Act approved Feb. 6th, 1884, 4th. Congress of the Republic of Texas., reprinted in H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, Vol. 2 at 177,178 (Austin, Gammel Book Co. 1898).
http://texinfo.library.unt.edu/lawsoftexas/pdf/law02003.pdf

AN ACT

To adopt the Common Law of England, to repeal certain Mexican Laws, and to regulate the Marrital Rights of parties.

Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) [178] shall, together with such acts be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress.

APPENDIX N

Section 5.001. Rule of Decision

Texas Civil Practice and Remedies Code

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 5. RULE OF DECISION

§ 5.001. Rule of Decision

The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

APPENDIX O. Slander in Texas Civil Practice and Remidies Code

§ 15.017. Libel, Slander, or Invasion of Privacy

A suit for damages for libel, slander, or invasion of privacy shall be brought and can only be maintained in the county in which the plaintiff resided at the time of the accrual of the cause of action, or in the county in which the defendant resided at the time of filing suit, or in the county of the residence of defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiff.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 16.002. One-Year Limitations Period

(a) A person must bring suit for malicious prosecution, libel, slander, or breach of promise of marriage not later than one year after the day the cause of action accrues.

(b) A person must bring suit to set aside a sale of property seized under Subchapter E, Chapter 33, Tax Code, not later than one year after the date the property is sold.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

APPENDIX P. Criminal Slander in Texas Finance Code

Texas Finance Code

Title 3 Financial Institutions and Businesses

Chapter 89 Miscellaneous Provisions Applicable to Savings and Loan Associations

SubChapter C Offenses and Penalties

§ 101 Criminal Slander

(a) A person commits an offense if the person, with intent to injure an association or a federal association in this state:

(1) knowingly makes, utters, circulates, or transmits to another person a statement that is untrue and derogatory to the financial condition of the association or federal association; or

(2) counsels, aids, procures, or induces another person to originate, make, utter, transmit, or circulate a statement or rumor that is untrue and derogatory to the financial

condition of the association or federal association.

(b) An offense under Subsection (a) is punishable by:

(1) a fine not to exceed $2,500;

(2) imprisonment in the institutional division of the Texas Department of Criminal Justice for not more than two years; or

(3) both the fine and imprisonment.

Acts 1997, 75th Leg., ch. 1008, § 1, eff. Sept. 1, 1997.

APPENDIX Q. 1987 Tort Reform Act

Texas Session Laws 1987

General and Special

70th Legislature - First Called Session

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Additions are indicated by <<+ UPPERCASE +>>

Deletions by <<- * * * ->>

Changes in tabular material are not indicated

ch. 2, 1st C.S.

S.B. No. 5

TORT REFORM--REVISION OF CIVIL PROCEDURES AND REMEDIES FOR PERSONAL INJURY,

PROPERTY DAMAGE OR DEATH AND DETERMINATION AND LIMITATIONS OF LIABILITY AND

DAMAGES

An Act relating to revising the Civil Practice and Remedies Code to reform procedures and remedies in civil actions for personal injury, property damage, or death and civil actions based on tortious conduct, including revisions and additions to laws governing the determination of and limitations on liability and damages.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. GENERAL PROVISIONS

TX CIV PRAC & REM § 9.001 Note (Vernon's)

SECTION 1.01. FINDINGS AND PURPOSE. (a) The 70th Legislature, Regular Session, of the State of Texas makes the following findings:

(1) The House/Senate Joint Committee on Liability Insurance and Tort Law and Procedure, appointed in 1986, was charged with studying the availability and cost of commercial, professional, and governmental liability insurance and the impact of the tort recovery process on the insurance industry. The joint committee engaged in extensive fact-finding and reported its findings and conclusions to the legislature.

(2) A serious liability insurance crisis currently exists in the State of Texas and is having adverse effects on the availability and affordability of various types of liability insurance and the economic development and growth of this state and the well-being of its citizens.

(3) Included among the wide variety of persons and entities and activities that are being adversely affected by the liability insurance crisis are:

(A) cities and their governmental and proprietary functions;

(B) counties, school districts, and other governmental units, and the educational and human services they provide;

(C) professionals, including physicians and health care providers, and the quantity, affordability, and availability of the various services they provide;

(D) charities and other nonprofit organizations and their humanitarian and benevolent services;

(E) day care centers and the services they provide; and

(F) businesses and industries, including the goods and services they provide and the incentives that encourage growth and expansion of existing enterprises and that attract new ventures.

(4) A lack of predictability in this state's justice system constitutes a significant contributing cause of the current liability insurance crisis.

(5) These public policy problems compel a legislative response that includes meaningful tort reform measures that will restore and maintain reasonable predictability in the civil justice system of Texas.

(6) The provisions of this Act will accomplish needed civil justice reform, while preserving the basic rights of injured

persons to obtain appropriate relief through civil actions under the laws of this state.

(b) The 70th Legislature, having determined that the measures embodied in this Act are necessary and appropriate in order to reform the civil justice system of this state, enacts this legislation for the purpose of reforming the civil justice system of Texas. To this end, this Act revises appropriate procedural and substantive provisions of the Civil Practice and Remedies Code applicable to actions for personal injury, property damage, or death and other civil actions based on tortious conduct.

. . .

SECTION 2.12. Subtitle C, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 41 to read as follows:

<<+CHAPTER 41. EXEMPLARY DAMAGES+>>

TX CIV PRAC & REM § 41.001 (Vernon's)

<<+§ 41.001. DEFINITIONS+>>

<<+IN THIS CHAPTER:+>>

<<+(1) "CLAIMANT" MEANS A PARTY, INCLUDING A PLAINTIFF, COUNTERCLAIMANT, CROSS-CLAIMANT, OR

THIRD-PARTY PLAINTIFF, SEEKING RECOVERY OF EXEMPLARY DAMAGES. IN A CAUSE OF ACTION IN WHICH A PARTY SEEKS RECOVERY OF EXEMPLARY DAMAGES RELATED TO INJURY TO ANOTHER PERSON, DAMAGE TO THE PROPERTY OF ANOTHER PERSON, DEATH OF ANOTHER PERSON, OR OTHER HARM TO ANOTHER PERSON, "CLAIMANT" INCLUDES BOTH THAT OTHER PERSON AND THE PARTY SEEKING RECOVERY OF EXEMPLARY DAMAGES.+>>

<<+(2) "DEFENDANT" MEANS A PARTY, INCLUDING A COUNTERDEFENDANT, CROSS-DEFENDANT, OR THIRD-PARTY DEFENDANT, FROM WHOM A CLAIMANT SEEKS RELIEF WITH RESPECT TO EXEMPLARY DAMAGES.+>>

<<+(3) "EXEMPLARY DAMAGES" MEANS ANY DAMAGES AWARDED AS AN EXAMPLE TO OTHERS, AS A PENALTY, OR BY WAY OF PUNISHMENT. "EXEMPLARY DAMAGES" INCLUDES PUNITIVE DAMAGES.+>>

<<+(4) "FRAUD" MEANS FRAUD OTHER THAN CONSTRUCTIVE FRAUD.+>>

<<+(5) "GROSS NEGLIGENCE" MEANS MORE THAN MOMENTARY THOUGHTLESSNESS, INADVERTENCE, OR ERROR OF JUDGMENT. IT MEANS SUCH AN ENTIRE WANT OF CARE AS TO ESTABLISH THAT THE ACT OR OMISSION WAS THE RESULT OF ACTUAL CONSCIOUS INDIFFERENCE TO THE RIGHTS, SAFETY, OR WELFARE OF THE PERSON AFFECTED.+>>

<<+(6) "MALICE" MEANS:+>>

<<+(A) CONDUCT THAT IS SPECIFICALLY INTENDED BY THE DEFENDANT TO CAUSE SUBSTANTIAL INJURY TO THE CLAIMANT; OR+>>

<<+(B) AN ACT THAT IS CARRIED OUT BY THE DEFENDANT WITH A FLAGRANT DISREGARD FOR THE RIGHTS OF OTHERS AND WITH ACTUAL AWARENESS ON THE PART OF THE DEFENDANT THAT THE ACT WILL, IN REASONABLE PROBABILITY, RESULT IN HUMAN DEATH, GREAT BODILY HARM, OR PROPERTY DAMAGE.+>>

TX CIV PRAC & REM § 41.002 (Vernon's)

<<+§ 41.002. APPLICABILITY+>>

<<+(A) THIS CHAPTER APPLIES TO AN ACTION IN WHICH A CLAIMANT SEEKS EXEMPLARY DAMAGES RELATING TO A CAUSE OF ACTION AS DEFINED BY SECTION 33.001.+>>

<<+(B) THIS CHAPTER DOES NOT APPLY TO:+>>

<<+(1) AN ACTION BROUGHT UNDER THE DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT (SUBCHAPTER E, CHAPTER 17, BUSINESS & COMMERCE CODE);+>>

<<+(2) AN ACTION BROUGHT UNDER CHAPTER 21,

INSURANCE CODE;+>>

<<+(3) AN ACTION BROUGHT UNDER THE WORKERS' COMPENSATION LAWS OF THIS STATE (ARTICLE 8306 ET SEQ., REVISED STATUTES);+>>

<<+(4) AN ACTION TO RECOVER EXEMPLARY DAMAGES AGAINST AN EMPLOYER BY THE EMPLOYEE'S BENEFICIARIES IN A DEATH ACTION ARISING OUT OF THE COURSE AND SCOPE OF EMPLOYMENT WHERE THE EMPLOYER IS A SUBSCRIBER UNDER THE WORKERS' COMPENSATION LAWS OF THIS STATE (ARTICLE 8306 ET SEQ., REVISED STATUTES);+>>

<<+(5) AN ACTION GOVERNED BY CHAPTER 81, CIVIL PRACTICE AND REMEDIES CODE;+>>

<<+(6) AN ACTION BROUGHT UNDER CHAPTER 246, ACTS OF THE 63RD LEGISLATURE, REGULAR SESSION, 1973, HOME SOLICITATION TRANSACTIONS (ARTICLE 5069-13.01 ET SEQ., VERNON'S TEXAS CIVIL STATUTES);+>>

<<+(7) AN ACTION BROUGHT UNDER CHAPTER 547, ACTS OF THE 63RD LEGISLATURE, REGULAR SESSION, 1973, DEBT COLLECTION PRACTICES (ARTICLE 5069-11.01 ET SEQ., VERNON'S TEXAS CIVIL STATUTES);+>>

<<+(8) AN ACTION BROUGHT UNDER CHAPTER 54, 91, OR 92, PROPERTY CODE;+>>

<<+(9) AN ACTION BROUGHT UNDER THE TEXAS MANUFACTURED HOUSING STANDARDS ACT (ARTICLE 5221F, VERNON'S TEXAS CIVIL STATUTES);+>>

<<+(10) AN ACTION BROUGHT UNDER THE TEXAS MOTOR VEHICLE COMMISSION CODE (ARTICLE 4413(36), VERNON'S TEXAS CIVIL STATUTES);+>>

<<+(11) AN ACTION BROUGHT UNDER THE TEXAS PROPRIETARY SCHOOL ACT, CHAPTER 32, EDUCATION CODE;+>>

<<+(12) AN ACTION BROUGHT UNDER SECTION 9.507 OR SECTION 27.01, BUSINESS & COMMERCE CODE;+>>

<<+(13) AN ACTION BROUGHT UNDER CHAPTER 36, FAMILY CODE;+>>

<<+(14) AN ACTION BROUGHT UNDER THE HEALTH SPA ACT (ARTICLE 52211, VERNON'S TEXAS CIVIL STATUTES);+>>

<<+(15) AN ACTION BROUGHT UNDER THE BUSINESS OPPORTUNITY ACT (ARTICLE 5069- 16.01 ET SEQ., VERNON'S TEXAS CIVIL STATUTES); OR+>>

<<+(16) AN ACTION BROUGHT UNDER THE TEXAS TIMESHARE ACT (ARTICLE 6573C, VERNON'S TEXAS CIVIL

STATUTES).+>>

<<+(C) IN AN ACTION TO WHICH THIS CHAPTER APPLIES, THE PROVISIONS OF THIS CHAPTER PREVAIL OVER ALL OTHER LAW TO THE EXTENT OF ANY CONFLICT.+>>

TX CIV PRAC & REM § 41.003 (Vernon's)

<<+§ 41.003. STANDARDS FOR RECOVERY OF EXEMPLARY DAMAGES+>>

<<+(A) EXEMPLARY DAMAGES MAY BE AWARDED ONLY IF THE CLAIMANT PROVES THAT THE PERSONAL INJURY, PROPERTY DAMAGE, DEATH, OR OTHER HARM WITH RESPECT TO WHICH THE CLAIMANT SEEKS RECOVERY OF EXEMPLARY DAMAGES RESULTS FROM:+>>

<<+(1) FRAUD;+>>

<<+(2) MALICE; OR+>>

<<+(3) GROSS NEGLIGENCE.+>>

<<+(B) THE CLAIMANT MUST PROVE THE ELEMENTS OF SUBSECTION (A)(1), (A)(2), OR (A)(3). THIS BURDEN OF PROOF MAY NOT BE SHIFTED TO THE DEFENDANT OR SATISFIED BY EVIDENCE OF ORDINARY NEGLIGENCE.+>>

TX CIV PRAC & REM § 41.004 (Vernon's)

<<+§ 41.004. FACTORS PRECLUDING RECOVERY+>>

<<+(A) EXEMPLARY DAMAGES MAY BE AWARDED ONLY IF DAMAGES OTHER THAN NOMINAL DAMAGES ARE AWARDED.+>>

<<+(B) EXEMPLARY DAMAGES MAY NOT BE AWARDED TO A CLAIMANT WHO ELECTS TO HAVE HIS RECOVERY MULTIPLIED UNDER ANOTHER STATUTE.+>>

TX CIV PRAC & REM § 41.005 (Vernon's)

<<+§ 41.005. AWARD SPECIFIC TO DEFENDANT+>>

<<+IN ANY ACTION IN WHICH THERE ARE TWO OR MORE DEFENDANTS, AN AWARD OF EXEMPLARY DAMAGES MUST BE SPECIFIC AS TO A DEFENDANT, AND EACH DEFENDANT IS LIABLE ONLY FOR THE AMOUNT OF THE AWARD MADE AGAINST THAT DEFENDANT.+>>

TX CIV PRAC & REM § 41.006 (Vernon's)

<<+§ 41.006. PREJUDGMENT INTEREST+>>

<<+PREJUDGMENT INTEREST MAY NOT BE ASSESSED OR RECOVERED ON AN AWARD OF EXEMPLARY DAMAGES.+>>

TX CIV PRAC & REM § 41.007 (Vernon's)

<<+§ 41.007. LIMITATION ON AMOUNT OF RECOVERY+>>

<<+EXCEPT AS PROVIDED BY SECTION 41.008, EXEMPLARY DAMAGES AWARDED AGAINST A DEFENDANT MAY NOT EXCEED FOUR TIMES THE AMOUNT OF ACTUAL DAMAGES OR $200,000, WHICHEVER IS GREATER.+>>

TX CIV PRAC & REM § 41.008 (Vernon's)

<<+§ 41.008. EXCEPTION+>>

<<+SECTION 41.007 DOES NOT APPLY TO EXEMPLARY DAMAGES RESULTING FROM MALICE AS DEFINED BY SECTION 41.001(6)(A) OR TO AN INTENTIONAL TORT.+>>

TX CIV PRAC & REM § 41.009 (Vernon's)

<<+§ 41.009. PROVISIONS NOT TO BE MADE KNOWN TO JURY+>>

<<+THE PROVISIONS OF SECTION 41.007 MAY NOT BE MADE KNOWN TO THE JURY THROUGH ANY MEANS, INCLUDING VOIR DIRE, INTRODUCTION INTO EVIDENCE, OR INSTRUCTION.+>>

. . .

SECTION 4.05. EFFECTIVE DATE. (a) Sections 2.01 through 2.12 and Article 3 of this Act apply only to suits filed on or after the effective date of this Act.

(b) If all or any part of a suit is filed before the effective date of this Act, the entire suit shall be governed with respect to the subject matter of Sections 2.01 through 2.12 and Article 3 of this Act by the applicable law in effect before that date, and that law is continued in effect only for this purpose, including any new trial or retrial of any such suit following appeal of the trial court's judgment.

(c) In actions in which a statute requires that a written notice be given to any person or entity prior to filing suit, the delivery of any such notice or the depositing of such a notice, postage prepaid, in the United States mail before the effective date of this Act shall constitute the filing of suit for the purposes of this section, provided that the suit is filed within 120 days after the notice is delivered or mailed, and such suits shall be governed with respect to the subject matter of Sections 2.01 through 2.12 and Article 3 of this Act by the applicable law in effect before that date, and that law is continued in effect only for this purpose, including any new trial or retrial of any such suit following appeal of the trial court's judgment.

TX CIV PRAC & REM § 9.001 Note (Vernon's)

SECTION 4.06. This Act takes effect only if S.B. 2, 70th Legislature, 1st Called Session, 1987, is enacted and becomes

law.

Approved June 16, 1987.

Effective Sept. 2, 1987, 90 days after date of adjournment.

TX LEGIS 1ST CS 2

END OF DOCUMENT

APPENDIX R. 1995 AN ACT relating to exemplary damages in civil suits.

1995 Tex. Sess. Law Serv. Ch. 19 (S.B. 25) (VERNON'S)

TX LEGIS 19 (1995)

VERNON'S TEXAS SESSION LAW SERVICE 1995 Seventy-Fourth Legislature, 1995 Regular Session

CHAPTER 19

Approved April 20, 1995.

1995 Tex. Sess. Law Serv. Ch. 19 (S.B. 25) (VERNON'S)

VERNON'S TEXAS SESSION LAW SERVICE 1995

Seventy-Fourth Legislature, 1995 Regular Session

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Additions are indicated by < < + Text + > >; deletions by < < - Text - > >

Changes in tables are made but not highlighted.

CHAPTER 19

S.B. No. 25

CIVIL ACTIONS--EXEMPLARY DAMAGES

AN ACT relating to exemplary damages in civil suits.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Chapter 41, Civil Practice and Remedies Code, is amended to read as follows:

CHAPTER 41. EXEMPLARY DAMAGES

<< TX CIV PRAC & REM § 41.001 >>

Sec. 41.001. DEFINITIONS. In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross- claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) <<+"Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.+>>

<<+(3)+>> "Defendant" means a party, including a counterdefendant, cross- defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

<<+(4) "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of

companionship and society.+>>

<<+(5)+>> <<-(3)->> "Exemplary damages" means any damages awarded as <<-an example to others, as->> a penalty<<-,->> or by way of punishment. "Exemplary damages" includes punitive damages.

<<+(6)+>> <<-(4)->> "Fraud" means fraud other than constructive fraud.

<<+(7)+>> <<-(5) "Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.->>

<<-(6)->> "Malice" means:

(A) <<+a specific intent+>> <<-conduct that is specifically intended->> by the defendant to cause substantial injury to the claimant; or

(B) an act <<+or omission:+>>

<<+(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and+>>

<<+(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others+>> <<-that is carried out by the defendant with a flagrant disregard for the rights of others and with actual awareness on the part of the defendant that the act will, in reasonable probability, result in human death, great bodily harm, or property damage->>.

<< TX CIV PRAC & REM § 41.002 >>

Sec. 41.002. APPLICABILITY. (a) This chapter applies to <<+any+>> <<- an->> action in which a claimant seeks exemplary damages relating to a cause of action <<-as defined by Section 33.001->>.

(b) <<+This chapter establishes the maximum exemplary damages that may be awarded in an action subject to this chapter, including an action for which exemplary damages are awarded under another law of this state.+>> This chapter does not apply to <<+the extent another law establishes a lower maximum amount of exemplary damages for a particular claim+>><<-:->>

<<-(1) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act;->>

<<-(2) an action brought under Chapter 21, Insurance Code;->>

<<-(3) an action brought under the workers' compensation laws of this state (Article 8306 et seq., Revised Statutes);->>

<<-(4) an action to recover exemplary damages against an employer by the employee's beneficiaries in a death action arising out of the course and scope of employment where the employer is a subscriber under the workers' compensation laws of this state (Article 8306 et seq., Revised Statutes);->>

<<-(5) an action brought under Chapter 246, Acts of the 63rd Legislature, Regular Session, 1973, Home Solicitation Transactions (Article 5069-13.01 et seq., Vernon's Texas Civil Statutes);->>

<<-(6) an action brought under Chapter 547, Acts of the 63rd Legislature, Regular Session, 1973, Debt Collection Practices (Article 5069-11.01 et seq., Vernon's Texas Civil Statutes);->>

<<-(7) an action brought under Chapter 54, 91, or 92, Property Code;->>

<<-(8) an action brought under the Texas Manufactured Housing Standards Act (Article 5221f, Vernon's Texas Civil Statutes);->>

<<-(9) an action brought under the Texas Motor Vehicle Commission Code (Article 4413(36), Vernon's Texas Civil Statutes);->>

<<-(10) an action brought under the Texas Proprietary School Act, Chapter 32, Education Code;->>

<<-(11) an action brought under Section 9.507 or Section 27.01, Business & Commerce Code;->>

<<-(12) an action brought under Chapter 36, Family Code;->>

<<-(13) an action brought under the Health Spa Act (Article 5221l, Vernon's Texas Civil Statutes);->>

<<-(14) an action brought under the Business Opportunity Act (Article 5069- 16.01 et seq., Vernon's Texas Civil Statutes); or->>

<<-(15) an action brought under the Texas Timeshare Act (Article 6573c, Vernon's Texas Civil Statutes)->>.

(c) <<+Except as provided by Subsections (b) and (d), in+>> <<-In->> an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

<<+(d) Notwithstanding any provision to the contrary, this chapter does not apply to Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983), an action brought under the Deceptive Trade Practices- Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act, or an action brought under Chapter 21, Insurance Code.+>>

<< TX CIV PRAC & REM § 41.003 >>

Sec. 41.003. STANDARDS FOR RECOVERY OF EXEMPLARY DAMAGES. (a) <<+Except as provided by Subsection (c), exemplary+>> <<-Exemplary->> damages may be awarded only if the claimant proves <<+by clear and convincing evidence+>> that the <<-personal injury, property damage, death, or other->> harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) <<+wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of "gross neglect" in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B)+>> <<-gross negligence->>.

(b) The claimant must prove <<+by clear and convincing evidence+>> the elements of <<+exemplary damages as provided by this section+>> <<- Subsection (a)(1), (a)(2), or (a)(3)->>. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence<<+, bad faith, or a deceptive trade practice+>>.

<<+(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.+>>

<< TX CIV PRAC & REM § 41.004 >>

Sec. 41.004. FACTORS PRECLUDING RECOVERY. (a) <<+Except as provided by Subsection (b), exemplary+>> <<-Exemplary->> damages may be awarded only if damages other than nominal damages are awarded.

(b) <<+A claimant may recover exemplary damages, even if only nominal damages are awarded, if the claimant establishes by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from malice as defined in Section 41.001(7)(A).+>> Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

<< TX CIV PRAC & REM § 41.005 >>

Sec. 41.005. <<+HARM RESULTING FROM CRIMINAL ACT. (a) In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.+>>

<<+(b) The exemption provided by Subsection (a) does not apply if:+>>

<<+(1) the criminal act was committed by an employee of the defendant;+>>

<<+(2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7, Penal Code;+>>

<<+(3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125, Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or+>>

<<+(4) the criminal act resulted from the defendant's

intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code, and the criminal act occurred after the statutory deadline for compliance with that duty.+>>

<<+(c) In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:+>>

<<+(1) the principal authorized the doing and the manner of the act;+>>

<<+(2) the agent was unfit and the principal acted with malice in employing or retaining him;+>>

<<+(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or+>>

<<+(4) the employer or a manager of the employer ratified or approved the act.+>>

<< TX CIV PRAC & REM § 41.006 >>

<<+Sec. 41.006.+>> AWARD SPECIFIC TO DEFENDANT. In any action in which there are two or more defendants, an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

<< TX CIV PRAC & REM § 41.006 >>

<< TX CIV PRAC & REM § 41.007 >>

Sec. <<+41.007+>> <<-41.006->>. PREJUDGMENT INTEREST. Prejudgment interest may not be assessed or

recovered on an award of exemplary damages.

<< TX CIV PRAC & REM § 41.007 >>

<< TX CIV PRAC & REM § 41.008 >>

Sec. <<+41.008+>> <<-41.007->>. LIMITATION ON AMOUNT OF RECOVERY. <<+(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.+>>

<<+(b) Exemplary+>> <<-Except as provided by Section 41.008, exemplary->> damages awarded against a defendant may not exceed <<+an amount equal to the greater of:+>>

<<+(1)(A) two+>> <<-four->> times the amount of <<+ economic+>> <<-actual->> damages<<+; plus+>>

<<+(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000;+>> or

<<+(2)+>> $200,000<<-, whichever is greater->>.

<<+(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:+>>

<<+(1) Section 19.02 (murder);+>>

<<+(2) Section 19.03 (capital murder);+>>

<<+(3) Section 20.04 (aggravated kidnapping);+>>

<<+(4) Section 22.02 (aggravated assault);+>>

<<+(5) Section 22.011 (sexual assault);+>>

<<+(6) Section 22.021 (aggravated sexual assault);+>>

<<+(7) Section 22.04 (injury to a child, elderly individual, or disabled individual);+>>

<<+(8) Section 32.21 (forgery);+>>

<<+(9) Section 32.43 (commercial bribery);+>>

<<+(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);+>>

<<+(11) Section 32.46 (securing execution of document by deception);+>>

<<+(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);+>>

<<+(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;+>>

<<+(14) Section 49.07 (intoxication assault); or+>>

<<+(15) Section 49.08 (intoxication manslaughter).+>>

<<+(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.+>>

<<+(e) The provisions of Subsections (a) and (b) may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.+>>

<< TX CIV PRAC & REM § 41.009 >>

<<+Sec. 41.009. BIFURCATED TRIAL. (a) On motion by a defendant, the court shall provide for a bifurcated trial under this section. A motion under this subsection shall be made prior to voir dire examination of the jury or at a time specified by a pretrial court order issued under Rule 166, Texas Rules of Civil Procedure.+>>

<<+(b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant.+>>

<<+(c) In the first phase of a bifurcated trial, the trier of fact shall determine:+>>

<<+(1) liability for compensatory and exemplary damages; and+>>

<<+(2) the amount of compensatory damages.+>>

<<+(d) If liability for exemplary damages is established during the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.+>>

<< TX CIV PRAC & REM § 41.010 >>

<<+Sec. 41.010. CONSIDERATIONS IN MAKING AWARD. (a) Before making an award of exemplary damages, the trier of fact shall consider the definition and purposes of exemplary damages as provided by Section 41.001.+>>

<<+(b) The determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.+>>

<< TX CIV PRAC & REM § 41.011 >>

<<+Sec. 41.011. EVIDENCE RELATING TO AMOUNT OF EXEMPLARY DAMAGES. (a) In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:+>>

<<+(1) the nature of the wrong;+>>

<<+(2) the character of the conduct involved;+>>

<<+(3) the degree of culpability of the wrongdoer;+>>

<<+(4) the situation and sensibilities of the parties concerned;+>>

<<+(5) the extent to which such conduct offends a public sense of justice and propriety; and+>>

<<+(6) the net worth of the defendant.+>>

<<+(b) Evidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial.+>>

<< TX CIV PRAC & REM § 41.012 >>

<<+Sec. 41.012. JURY INSTRUCTIONS. In a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011.+>>

<< TX CIV PRAC & REM § 41.013 >>

<<+Sec. 41.013. JUDICIAL REVIEW OF AWARD. (a) Except as provided for in Subsection (b), an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award. The written opinion shall address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of this chapter.+>>

<<+(b) This section does not apply to the supreme court with respect to its consideration of an application for writ of

error.+>>

<< TX CIV PRAC & REM § 41.008 >>

<<-Sec. 41.008. EXCEPTION. Section 41.007 does not apply to exemplary damages resulting from malice as defined by Section 41.001(6)(A) or to an intentional tort.->>

<< TX CIV PRAC & REM § 41.009 >>

<<-Sec. 41.009. PROVISIONS NOT TO BE MADE KNOWN TO JURY. The provisions of Section 41.007 may not be made known to the jury through any means, including voir dire, introduction into evidence, or instruction.->>

<< Note: TX CIV PRAC & REM § 41.001 >>

SECTION 2. This Act takes effect September 1, 1995, and applies only to a cause of action that accrues on or after that date. A suit filed before the effective date of this Act is governed by the law applicable to the claim that existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on February 15, 1995, by a viva-voce vote; the Senate concurred in House amendments on April 11, 1995, by a viva-voce vote; passed the House, with amendments, on

April 6, 1995, by a non-record vote.

Approved April 20, 1995.

Effective Sept. 1, 1995.

TX LEGIS 19 (1995)
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APPE[illegible]IX S. 2005, 3rd Petition for Review in the Supreme Court of Texas.

NO. 05- **0441**

IN THE

SUPREME COURT OF TEXAS

AUSTIN, TEXAS

JOE ED BUNTON

Petitioner,

VS.

BASCOM W. BENTLEY III

Respondent.

PETITION FOR REVIEW

Joe Ed Bunton
Pro Se
925 N. Link Street
Palestine, Texas 75801
(903) 723-6170

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether court below erred in not finding that the jury award of $1 million in exemplary damages are excessive because the award was not based on dispassionate and reasoned deliberation but based on arbitrariness, passion or bias.

Issue 2: Whether the Fourteenth Amendment protection of "due process" is unconstitutionally violated when the court below misapplied the standard of review.

Issue 3: Whether the court below erred when it failed to apply Chapter 41. Damages of the Tex. Civ. Prac. & Rem. Code.

Issue 4: Whether the First and Fourteenth Amendment protection of freedom of speech are abridged by the State's complex and vague slander laws combined with unfair procedure, that can produced huge exemplary damage award to punish private individuals for political speech about a public official.

APPENDIX T. 2005, Motion for Rehearing, 3rd Petition for Review in the Supreme Court of Texas.

NO. 05 - 0441

IN THE

SUPREME COURT OF TEXAS

AUSTIN, TEXAS

JOE ED BUNTON

Petitioner,

VS.

BASCOM W. BENTLEY III

Respondent

Motion for Rehearing

Joe Ed Bunton
Pro Se
925 N. Link Street
Palestine, Texas 75801
(903) 723 6170

MOTION FOR REHEARING

SUMMARY OF THE ARGUMENTS

If this motion for rehearing is not granted the errors made by the court of appeals will cause an improper judgment of at least $700,000 in exemplary damages which is excessive by both statutory and constitutional grounds. This motion for rehearing is based on matters of law only and has intentionally avoid any issue where there is judicial or jury discretion. The factors this court should consider in deciding whether to grant this Motion for Rehearing in this case are:

(1.) This case shows that there is a conflict between the Courts of Appeals on the important points of law, and how the appellate review of a jury of exemplary damages should be conducted involving both state and federal standards;

(2.) This case involves the construction of the exemplary damage statute, the effective date, duty of the trial judge and the duty of the courts of appeal;

(3.) Constitutional issues involved due process connected by the *Fourteenth Amendment* and freedom of speech protected by the *First Amendment* of United States Constitution;

(4.) a serious error of law was committed by the court of appeals by ignoring the statutory limitations on awards of exemplary damages in Chapter 41 of the *Tex. Civ. Prac. & Rem. Code*. It is of great importance to the state's jurisprudence that the appellate co..rt's operate under the rule of law; and

(5.) By its actions the Court of Appeals has decided that is not necessary to conduct the judicial review required by Section 41.013 *Tex. Civ. Prac. & Rem.* Code when reviewing an exemplary damage award by Fourteenth Amendment standards.

Without doubt a reversible error resulted from the Court of Appeals not applying the limitations on an amount of

recovery of exemplary damages in Section 41.008 of the Tex. Civ. Prac. & Rem. Code, which cause the rendition of the improper judgment of at least $700,000.

POINTS RELIED ON FOR THE REHEARING:

(1.) The court of appeals failed to even attempt to conduct the statutory judicial review the award of exemplary damages required by Section 41.013 of the *Tex. Civ. Prac. & Rem. Code.* Other courts of appeal are conducting the judicial review of the award of exemplary damages as required by statute.

(2.) The Court of Appeal failure to determine the applicable version of the exemplary damage statute ,Chapter 41 to the Tex. Civ. Prac. & Rem. Code. .{SECTION 2. 1995 Tex. Sess. Law Serv. Ch. 19 (S.B. 25) (VERNON'S)}

(3.) Court of Appeals failed to review instructions to the jury to determine if the state law correctly described in the purpose for punitive damages and the limitations on jury discretion. (Section 41.012 JURY INSTRUCTIONS, *Tex. Civ. Prac. & Rem. Code, State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S.Ct. 1513,2003.SCT.0000067 (2003)(VersusLaw),

(a.) "Clear and convincing evidence" was not the standard of evidence for determining "malice" (Section 41.001.(7) Tex. Civ. Prac. & Rem. Code) in jury question six. The jury was wrongly instructed to base its answer on the preponderance of evidence. (CR 97, RR771)

(b.) The purpose of "exemplary damage" in jury question 10, wrongly included "as an example to others"(CR107)

(c.) The factors to consider in awarding exemplary damages in jury question 10, wrongly included "f. Compensation for inconvenience" and "g. the frequency of the wrong committed" and failed to include "the net worth of the

defendant" required Section 41.011 .(6) *Tex. Civ. Prac. & Rem. Code*. (CR107)

(4.) As a matter of law Court of Appeals erred in reviewing the third guidepost in *BMW v. Gore* and *State Farm v. Campbell* the examples used are not comparable to this case.

MOTION FILED

FEB 23 2006

No. 05-923

In the

Supreme Court of the United States

JOE ED BUNTON,
Petitioner,

v.

BASCOM W. BENTLEY III,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; AND BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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SUPREME COURT, U.S.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Pursuant to Supreme Court Rule 37.2(b), *amicus curiae* move the Court to allow it to file its brief in support of the petitioner, which follows this motion.

Petitioner, Joe Ed Bunton, has consented to the filing of the attached brief. Respondent, Bascom W. Bentley, III, who has waived his right to reply, did not consent to the filing of the attached brief.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus curiae recognizes an important First Amendment right implicated in this case. A successful defamation action requires the plaintiff to prove the falsity of the defamatory statements. This case presents the issue of which standard of proof — preponderance of the evidence or clear and convincing evidence — courts should apply to determine falsity. The decision of the Texas Supreme Court in the underlying case exemplifies the confusion surrounding this question. It applied the preponderance of the evidence standard based on precedent that followed a case that is no longer good law.

The cases addressing this issue show a tangle of conflicting decisions, concurrences, dissents and dicta. This case provides the Court with an opportunity to end the confusion and provide equal First Amendment protection to media entities in every state.

Given the broad ramifications of a decision in this area for First Amendment rights, *amicus curiae* respectfully requests that this Court grant it leave to file the attached brief.

Dated: February 23, 2006

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The present case raises important issues regarding the level of proof required to prove the falsity of statements at issue in a defamation action. In the underlying case, the Supreme Court of Texas followed a minority of jurisdictions and allowed the Respondent to prove the falsity of the Petitioner's statements using only a preponderance of the evidence. Most jurisdictions hold clear and convincing evidence to be the standard of proof.

Inconsistent legal standards lead to self-censorship of complicated or controversial stories. The few jurisdictions applying the preponderance of the evidence standard essentially put a balancing test on the truth. National publishers are less inclined to publish as they have less protection in a minority of the jurisdictions. Setting a truly national standard requiring clear and convincing evidence to prove falsity will end this chilling of speech and provide the "breathing space" necessary for full and robust speech.

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than *amicus* made a monetary contribution to the preparation and submission of this brief. Because Respondent did not consent in writing to the filing of this brief, a motion for leave to file precedes this section.

SUMMARY OF THE ARGUMENT

This Court clearly established a strong protection for speech under the First Amendment by ruling that a plaintiff in a defamation case must prove the falsity of the defamatory statements. This Court, however, has not yet determined the level of proof necessary to prove falsity. In order for publishers to properly use the "breathing space" of speech provided by the First Amendment, the Court should follow the majority of courts and apply a clear and convincing burden of proof to prove falsity.

We urge the court to follow the majority of courts and find that a plaintiff needs to prove falsity by clear and convincing evidence. Only a small minority of states and circuits have found that a plaintiff needs to prove falsity by the preponderance of the evidence. This divergence among the states and circuits allows for inconsistent First Amendment protection.

This Court's guidance is essential because courts investigating this issue rely only upon an overturned decision and a concurrence to support the arguments on each side. The confusion surrounding this issue hampers the media's ability to report on controversial or complicated issues as publishers must guarantee the truth of all assertions. Good faith mistakes and mix-ups become legally false statements that give strength to a plaintiff's arguments of actual malice.

ARGUMENT

I. A clear standard of proof for proving falsity in defamation cases is necessary for lower courts to develop case law consistent with this Court's First Amendment jurisprudence.

At common law, truth was an affirmative defense for defamation. But when this Court constitutionalized the common law of defamation in *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964), it opened the door to alter the elements required to prove defamation. Defamation plaintiffs must now, as a part of their *prima facie* case, prove the falsity of the defamatory statements. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) ("a public figure must show the falsity of the statements at issue in order to prevail in a suit for defamation"); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (public officials can seek defamation remedy only through establishing that the statement was false); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (plaintiff must "prove a false publication attended by some degree of culpability"). The Court fully understood the difficulty of proving falsity and has accepted that under this rule the First Amendment will sometimes protect false statements. This is the price to be paid to encourage free speech on public issues. *See Hepps*, 475 U.S. at 778 ("We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so.").

After shifting the burden to the plaintiff to prove falsity, the Court "expressed no view" on the issue of the proper standard of proof. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989). By refusing to determine whether a plaintiff must prove falsity by a preponderance of the evidence or by clear and convincing evidence,

this Court opened the door for confusion among the lower courts. While most have followed the correct clear and convincing standard, a few have applied the preponderance of the evidence standard.

The problem with the preponderance of the evidence standard is that no current case law supports it. In 1969, the Second Circuit, without discussing the issue, found that falsity could be proved by the preponderance of the evidence. *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969). However, this decision, the most-cited[2] decision supporting the preponderance of the evidence standard, is no longer considered good law in the Second Circuit. Only seven years later the Second Circuit applied the standard of clear and convincing evidence. *Buckley v. Littell*, 539 F.2d 882, 889-890 (2d Cir. 1976) ("public figure[s] must . . . have demonstrated with convincing clarity not only that the appellant's statements were false, but that appellant knew they were false or made them with reckless disregard of their truth or falsity.") In 1999, the Second Circuit again addressed the issue and, in finding the clear and convincing standard, noted that New York's jury instructions agreed. *Celle v. Filipino Reporter Enters.*, 209 F.3d 163. The Second Circuit revisited the issue in 2005 and found, after extensive discussion, New York law follows the majority view that proving falsity

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[2]Cases which have cited *Goldwater* as supporting the preponderance of the evidence standard include *Tilton v. Capital Cities/ABC, Inc.*, 905 F.Supp. 1514 (N.D. Okla. 1995); *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990); *DiBella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005); *Rattray v. City of National City*, 51 F.3d 793 (9th Cir. 1994); *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987); *Hatre-Hanks*, 491 U.S. 657 (1989); *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163 (2d Cir. 2000); *Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001); and *Turner v. KTRK Television*, 38 S.W.3d 103 (Tex. 2000).

requires clear and convincing evidence. *DiBella v. Hopkins*, 403 F.3d 102, 115 ("[W]e hold the district court correctly charged the jury requiring it to find falsity by clear and convincing proof.").

Although *Goldwater's* reading of this issue is no longer good law, other courts have cited *Goldwater* as an example and precedent for the preponderance of the evidence standard. For example, the Ninth Circuit followed *Goldwater* and adopted the preponderance of the evidence standard — ignoring *Buckley's* more recent ruling. *Rattray*, 51 F.3d at 801 ("The only circuit that has decided the question held that proof of the actual falsity of allegedly defamatory statements need only be proven by the preponderance of the evidence.").

While the most-cited argument for the preponderance of the evidence rule comes from an out-of-date decision, a decision often used to support the clear and convincing standard is a concurrence which, unlike *Goldwater*, fully explained the reasoning for its decision. Judge Griffin Bell's concurrence in *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972) laid out the logic behind applying a clear and convincing standard for proving falsity[3]. Bell looked to Court's decision in *Garrison* to find that a narrow reading of the case requiring only a preponderance of the evidence should be rejected. *Firestone*, 460 F.2d at 722. A narrow reading "would hardly comport with the other broad safeguards created in *New York Times* and its progeny to vouchsafe freedom of the press." *Id.* He concluded the Court implicitly required a plaintiff to prove falsity by clear and convincing

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[3]Bell's concurrence has often been used in to show the argument for the clear and convincing standard. *See, e.g., Tilton*, 905 F.Supp. at 1519; *Newton*, 930 F.2d at 669; *Tucker*, 237 F.3d at 281; *Tavoulareas*, 817 F.2d at 786; *Rattray*, 51 F.3d at 801; and *Turner*, 38 S.W.3d at 117.